

# **EXHIBIT 24**

Michael Berkow  
2/25/2013

1

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 11-cv-03071 (SRN/JJK)

Larry E. Smith, as trustee for  
the Heirs and Next of Kin of  
David Cornelius Smith,

Plaintiff,

vs.

Timothy Gorman and Timothy Callahan,  
acting in their individual capacities  
as Minneapolis police officers, and  
The City of Minneapolis,

Defendants.

VIDEOTAPED DEPOSITION TRANSCRIPT OF

MICHAEL BERKOW

February 25, 2013  
at

**COPY**

Gaskins Bennett Birrell Schupp, LLP  
333 South Seventh Street  
Suite 2900  
Minneapolis, MN 55402

Reporter: Jane T. Doby  
Registered Merit Reporter  
Doby Professional Reporting, Inc.  
DobyReporting.com  
952.943.1587

## Michael Berkow

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	2		4
1 APPEARANCES:		1 (Oath administered.)	
2 On Behalf of the Plaintiff:		2 THE WITNESS: I do.	
3 Robert Bennett, Attorney at Law		3 EXAMINATION	
4 rbennett@gaskinsbennett.com		4 BY MR. BENNETT:	
5 Jeffrey S. Storms, Attorney at Law		5 Q Would you state your full name for the	
6 jstorms@gaskinsbennett.com		6 record, spelling your last, please.	
7 Kathryn Bennett, Attorney at Law		7 A Michael Berkow. B-E-R-K-O-W.	
8 kbennett@gaskinsbennett.com		8 Q And how old are you, sir?	
9 GASKINS BENNETT BIRRELL SCHUPP, LLP		9 A I'm 57.	
10 333 South Seventh Street		10 Q I'm showing you what has been marked -- we've	
11 Suite 2900		11 marked three exhibits so far for the deposition. The	
12 Minneapolis, MN 55402		12 first is your 22-page report dated March -- or excuse	
13 On Behalf of the Defendants:		13 me, December 12 -- excuse me, December 17th, 2012 for	
14 Burl T. Osborne, Assistant City Attorney		14 this matter. Correct?	
15 burl.osborne@ci.minneapolis.mn.us		15 A Yes, sir.	
16 CITY OF MINNEAPOLIS-OFFICE OF CITY ATTORNEY		16 Q Exhibit 2 is Attachment A to that report, and	
17 350 South Fifth Street		17 Exhibit B -- or 3 is Attachment B to the report.	
18 City Hall, Room 210		18 Correct?	
19 Minneapolis, MN 55415		19 A Yes, sir.	
20 Videographer: Jayme Hogan, Envision Video		20 Q All right.	
21 NOTE: Pursuant to Minnesota Rule of Civil Procedure		21 And those -- you prepared the Exhibit 1 on	
22 30.06, the original transcript will be		22 behalf of the City of Minneapolis at the behest of the	
23 delivered to Gaskins Bennett Birrell		23 City Attorney's Office; is that right?	
24 Schupp, LLP, the noticing party.		24 A Yes, sir, I did.	
25 NOTE: Exhibit Nos. 1 through 6 were marked		25 Q The...	
	3		5
1 PROCEEDINGS		1 MR. BENNETT: I'm going to have to staple	
2 (The videotaped deposition of MICHAEL BERKOW		2 these. Do we have a stapler? Somewhere in there?	
3 was commenced at 9:02 a.m. as follows:)		3 THE WITNESS: There's a paperclip right	
4 (Exhibits 1 through 3 were marked for		4 there.	
5 identification.)		5 MR. BENNETT: I'm going to paperclip it.	
6 MICHAEL BERKOW,		6 We'll staple it later.	
7 called as a witness, being first duly sworn, was		7 BY MR. BENNETT:	
8 examined and testified as follows:		8 Q Attachment A is you list your publications, a	
9 ***		9 list of cases which you testified as an expert by trial	
10 VIDEOGRAPHER: This is the video deposition		10 or deposition in the past four yours and your fee	
11 of Michael Berkow. The date is February 25th, 2013,		11 schedule; is that correct?	
12 and the time is approximately 9:02 a.m.		12 A Yes, sir.	
13 Would each attorney please state his or her		13 Q Do you know how much you have been paid in	
14 name for the record.		14 this case to date?	
15 MR. BENNETT: Robert Bennett, appearing on		15 A I believe it's approximately \$16,000.	
16 behalf of the plaintiff.		16 Q Okay. And that doesn't include the charges	
17 MR. STORMS: Jeff Storms, also on behalf of		17 to come out here and testify today?	
18 the plaintiff.		18 A No, sir.	
19 MS. BENNETT: Kathryn Bennett for the		19 Q Okay. So that would be in addition to the	
20 plaintiffs.		20 16,000?	
21 MR. OSBORNE: Burt Osborne for the		21 A Yes, sir.	
22 defendants.		22 Q I'd like to go through Attachment B, which is	
23 VIDEOGRAPHER: Thank you.		23 Exhibit 3. That's your CV; is that correct?	
24 Would the court reporter please administer		24 Curriculum vitae?	
25 the oath.		25 A It's a version of it, yes, sir.	

2 (Pages 2 to 5)

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	6	8
1      Q	And by "a version," what do you mean?	1      police officer before then?
2      A	Well --	2      A Before November 1st, 1976?
3      Q	Do you have -- do you have other versions?	3      Q Correct.
4      A	Sure.	4      A Yeah, no, sir.
5      Q	This is the one you prepared for purposes of	5      Q You were just -- were you in a cadet program
6      this report?	6      or -- I mean, did -- your...	
7      A	Yes, that's correct.	7      How did you become a police officer with the
8      Q	Is it true and accurate?	8      Rochester Police Department?
9      A	Yes, sir.	9      A In New York state it's a civil service test.
10     Q	Okay.	10     So I took a civil service test, was placed on a list
11     Q	Where did you grow up?	11     and was ultimately notified that I was accepted for
12     A	I lived in a lot of places. I was born in	12     employment.
13     Texas.		13     Q And where did you take your police skills
14     Q	I see you ultimately went to -- you got your	14     training?
15     B.A., bachelor of arts, from Kalamazoo College?		15     A It -- my basic police academy?
16     A	Yes.	16     Q Yes.
17     Q	Is that in Kalamazoo, Michigan?	17     A At the Monroe County Regional Criminal
18     A	Yes.	18     Justice Training Center.
19     Q	So you were not a Michigan native or --	19     Q In New York?
20     A	Oh, no, sir.	20     A Yes, sir.
21     Q	Okay.	21     Q And you did that prior to November of '76 or
22     Q	Then you -- you got that in 1978. What --	22     after?
23     what year did you graduate from high school?		23     A After.
24     A	1973.	24     Q Okay.
25     Q	And did you spend all of your baccalaureate	25     But you're actually -- while you're at the
	7	9
1	time at Kalamazoo College?	1      academy or the training academy, you are a police
2	A No, sir.	2      officer, is that right?
3	Q Where did you -- where else did you go to	3      A Yes, sir. Yes, sir.
4	college?	4      Q And you were a police officer for the
5	A University of Rochester.	5      Rochester, New York Police Department from November of
6	Q What years did you attend there?	6      '76 until March of '82?
7	A It would have been 1978, part of 1978.	7      A Yes, sir.
8	Portion.	8      Q You can look at Exhibit 3, if you'd like.
9	Q When did you start Kalamazoo College?	9      A Oh, I'm sorry. I'm trying to -- I'm looking
10	A I started Kalamazoo in September of 1973.	10     over your shoulder.
11	Q And how long did you attend Kalamazoo College	11     Q Yeah, you can --
12	consecutively?	12     A Excuse me.
13	A I attended until the fall of 1976.	13     Q Whatever you want. That's fine, too. But
14	Q By then what were you in terms of credits?	14     that's why I gave it to you.
15	Were you a junior at that time, or a sophomore?	15     A You're just on a different page. I don't --
16	A Senior, sir.	16     I think you might not have given me a complete
17	Q You had not yet graduated, though?	17     attachment. Or did you? Are you starting down here?
18	A No, sir.	18     I'm sorry. Okay. Go ahead.
19	Q So you left Kalamazoo College to go back to	19     Q I'm trying to follow it chronologically.
20	Rochester?	20     A Yes, sir.
21	A Yes, sir.	21     Q Your education and your work history kind of
22	Q And you were appointed a peace officer in	22     intertwine; is that --
23	November 1 of '76, correct?	23     A Yeah, I would say that is correct, yes, sir.
24	A Yes, sir.	24     Q Okay. So you were -- you were a police
25	Q Did you have any training in -- to become a	25     officer. And what was your rank from '76 until '82?

3 (Pages 6 to 9)

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	10		12
1	A Police officer.	1	ninety - '81? From law school?
2	Q All right.	2	A I believe it's May of '81, yes, sir.
3	A Would have had different assignments, but my	3	Q And you remain a police officer in Rochester
4	rank was police officer.	4	with a law degree until March of 1982; is that right?
5	Q Okay. You hadn't become a sergeant or --	5	A Yes, sir.
6	A No, sir.	6	Q Then you're -- you say you were appointed as
7	Q So then you decide some -- in the middle of	7	a confidential law clerk. Now, I don't know what that
8	being this police officer stint at the -- at Rochester	8	is. To the Honorable Michael A. Telesca. Is that
9	Police Department you're going to finish your	9	how -- did I say that right?
10	baccalaureate degree; is that right?	10	A Telesca.
11	A Yes, sir.	11	Q Telesca. From March of '82 to March of '83.
12	Q And you do that at the University of	12	So a one-year clerkship?
13	Rochester but get a diploma from Kalamazoo College?	13	A Yes, sir.
14	A Correct.	14	Q What is a confidential law clerk? I don't
15	Q All right. And you do that in 1978	15	know.
16	ultimately, correct?	16	A That was the title that they called it at the
17	A Yes, sir.	17	time that I went to work for him. I was a law clerk to
18	Q When in '78?	18	a federal judge.
19	A When did I get my diploma?	19	Q Okay. Okay. So how many law clerks did that
20	Q Yeah.	20	federal judge have?
21	A I believe it was May or June.	21	A Two.
22	Q Okay.	22	Q Okay. And Judge Telesca was an Article III
23	A I'm not a hundred percent certain.	23	United States District Court judge, correct?
24	Q Were you full-time on campus at the	24	A Yes, sir.
25	University of Rochester?	25	Q And you did that for one year?
	11		13
1	A No, sir.	1	A Approximately one year, yes, sir.
2	Q So it was part-time? Was it at night or...	2	Q Then what did you do?
3	A Actually, during the day.	3	A I then accepted a position as a litigation
4	Q Okay. I suppose you could work the night	4	associate, as an associate at a law firm.
5	shift and go to school during the day if you're a	5	Q And where was the law firm located?
6	police officer, correct?	6	A Seattle, Washington.
7	A Yes, sir.	7	Q And how big a firm was that at the time?
8	Q All right.	8	A I believe it was about, as -- best of my
9	Then you decide while you're a police officer	9	recollection, it was about 75 lawyers at that time.
10	to attend the Syracuse University College of Law; is	10	The name has changed and it's obviously a much larger
11	that right?	11	firm today.
12	A Yes, sir.	12	Q What's the name of it today?
13	Q Do you do that on a full-time basis?	13	A Last time I checked, it was Davis Wright
14	A Yes, sir.	14	Tremaine.
15	Q And is that a day program or a night program?	15	Q Okay. And you were there on the order of
16	A To my knowledge, at that time they only had a	16	eight months or so; is that right?
17	day program.	17	A Approximately, yes, sir.
18	Q Okay. How long did it take you to go through	18	Q March of '83 to November of '83?
19	law school?	19	A Approximately, yes, sir.
20	A Three years.	20	Q Did you take and pass the Washington state
21	Q And you took the New York bar?	21	bar?
22	A Yes, sir.	22	A I did.
23	Q And passed?	23	Q And why did you decide to leave?
24	A Yes, sir.	24	A I decided I liked being a police officer
25	Q Then you graduated when? In like June of	25	better than I liked being a lawyer.

4 (Pages 10 to 13)

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	14		16
1.	Q The -- so you get reinstated to the Rochester Police Department in November of '83 and serve as a police officer there for ten years until September of 1993, correct?	1	Baltimore, Maryland. Right?
2.	A Yes. Yes, sir, that is correct.	2	A Yes, that would be correct.
3.	Q Promoted to sergeant in '86 and lieutenant in 1990, correct?	3	Q How did you pull that off? How long is that master's program? Was it an executive program or a regular, at least year or two-year master's program?
4.	A Yes, sir, that is correct.	4	A It's a two years master's program, but it's in executive format. So it's two full days every other week.
5.	Q In 1984 you went to the FBI National Law Institute; is that right?	5	Q So you have to fly across country and go to school?
6.	A Yes, sir.	6	A Yes, sir.
7.	Q How long was that program?	7	Q Okay.
8.	A I -- I don't recall exactly how long it was.	8	You say that you were -- that you went to the United States Department of Justice International Crime Investigative Training Assistance Program. When was that?
9.	It was -- whether it was a week or two weeks. I don't recall.	9	A That was in August/September timeframe of 1993.
10.	Q It's not a long program, though, right?	10	Q Was that a job or was that -- were you on loan from a police department? I'm trying to just figure that out.
11.	A No. Well, I don't know what you mean by "long."	11	A It started as a detail where I was detailed from the police department to the Department of Justice.
12.	Q Like a semester of college --	12	Q Okay.
13.	A No, sir.	13	
14.	Q Or --	14	
15.	A No, sir.	15	
16.	Q -- law school?	16	
17.	A No, sir.	17	
18.	Q Okay.	18	
		15	
1.	A No, sir.	1.	A And then became a full-time position. I mean, it was full-time all the time, but it became a -- an actual U.S. Department of Justice employee.
2.	Q How about the FBI National Academy, 173rd Session, that's -- how long is that program?	2.	Q Okay. And when was that, that you were an actual Department of Justice employee?
3.	A That's a -- I believe that is ten weeks.	3.	A Sometime during that same timeframe. I couldn't tell you exactly when.
4.	Q All right.	4.	Q Then you leave to -- that to go become chief of police in -- is it Coachella?
5.	Southwest Command College, how long is that program?	5.	A That would be Coachella, California, yes, sir.
6.	A You know, I don't recall. I want to say it was either two or three weeks. It's a several-week-long program.	6.	Q And you're there from April of '95 to July of '97? Is that right?
7.	Q And then ultimately you got a master's in science -- Master of Science in Leadership and Management in May of 2000. Correct? From Johns Hopkins?	7.	A Yes, sir.
8.	A Yes, sir.	8.	Q South Pasadena Police Department from July of '97 to August of 2001; is that right?
9.	Q Was that -- were you an on-campus student at Johns Hopkins University?	9.	A That is correct, yes, sir.
10.	A Yes, sir.	10.	Q Chief of police of Irvine Police Department at August 2001 to April 2003?
11.	Q And where is that located?	11.	A Yes, sir.
12.	A Baltimore, Maryland.	12.	Q And then deputy chief of police at LAPD from April 2003 to November of 2006?
13.	Q Was that at the same time that you were chief of police at the South Pasadena Police Department?	13.	A Yes, sir.
14.	A Yes, sir.	14.	Q Any of those -- did you leave all of those positions voluntarily?
15.	Q They're a ways away from each other, aren't they? Pasadena, California and -- what's it --	15.	

5 (Pages 14 to 17)

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	18		20
1      A Yes, sir.		1      for and in charge of all of the criminal investigators	
2      Q And as to L.A., you were not -- you were not		2      in the United States Coast Guard worldwide. So it's	
3      terminated, correct?		3      similar to being a criminal investigative division	
4      A Absolutely not.		4      command, would be the analogy I would use for a police	
5      Q Were -- was it suggested that you resign from		5      department.	
6      L.A.?		6      Q How many investigators are worldwide in the	
7      A The opposite.		7      Coast Guard?	
8      Q They wanted to keep you?		8      A Just under 400. Somewhere in the --	
9      A Yes, sir.		9      depending on if you count reserves and full-time.	
10     Q Okay. But you decided to go to Savannah-		10     Q Okay.	
11     Chatham Metro Police Department in Savannah, Georgia;		11     Are you presently a member of the -- good	
12     is that right?		12     standing of any bar association of any state?	
13     A Yes, sir.		13     A New York state bar. But I'm in what they --	
14     Q You leave them in November of 2009 and go		14     I believe it's called a retirement status.	
15     to -- was it Kroll at the time or was it --		15     Q Does that mean you don't keep up your CLE and	
16     A It was Allegri at the time.		16     that sort of thing?	
17     Q Okay. And then Kroll buys Allegri,		17     A That's correct.	
18     ultimately?		18     Q You just -- so you -- you wouldn't actually	
19     A No. Allegri bought Kroll.		19     be -- if you had to go get a certification of	
20     Q Okay.		20     membership in good standing, you couldn't get one until	
21     A Yes. This is a little confusing at this --		21     you complied with your CLE requirements, as I	
22     this one.		22     understand it, correct?	
23     Q And you're there for two and a half years?		23     A I have no idea.	
24     A Started in November -- I guess I -- yes.		24     Q Okay.	
25     Q And then you leave to go to Strategic Policy		25     A I pay a fee, I have a certain -- I get	
	19		21
1      Partners. What's that?		1      letters from them on a regular basis to confirm my	
2      A It's just a consulting firm. Does --		2      status.	
3      Q Where?		3      Q Can you practice law in the courts of the	
4      A -- police consulting.		4      state of New York?	
5      Q Okay.		5      A I don't know. I haven't looked into it. I	
6      And where did you consult for?		6      don't -- I don't practice law in the state.	
7      A You mean who were the clients?		7      Q You don't know if you can or you can't?	
8      Q Yeah.		8      A I have no idea.	
9      A It ranged from clients inside the United		9      Q Okay. How about are you a member in the good	
10     States to international clients, various police		10     standing of the bar association -- bar of any United	
11     departments and governments.		11     States District Court, any U.S. Court of Appeals or the	
12     Q Was one of them the Boston Police Department?		12     United States Supreme Court?	
13     A Yes, sir.		13     A I have no idea. I don't know if that expires	
14     Q Okay. Then you left to join the U.S. Coast		14     or have -- once having had that, if it expires. I just	
15     Guard Investigative Service in October of 2012?		15     have no idea.	
16     A Yes, sir.		16     Q Okay. Have you ever been disciplined or	
17     Q And you -- that's your present employer?		17     sanctioned by any bar association or any court of any	
18     A That is.		18     competent jurisdiction?	
19     Q And what are your duties and responsibilities		19     A Never.	
20     there?		20     Q Okay.	
21     A I serve as the director of the Coast Guard		21     How long have you held yourself out as being	
22     Investigative Service.		22     available to do expert witness testimony?	
23     Q Okay. So what does that amount to? Tell me		23     A I'm not sure I understand the question, sir.	
24     what you do on a day-to-day basis.		24     Q Well, you know, Mr. Osborne found you,	
25     A I am the leader of all of -- I'm responsible		25     looking for an expert. Did you have other people who	

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<p>22</p> <p>1 hired you as a -- as being an expert in police matters 2 for testimonial purposes?</p> <p>3     <b>A At different times, yes, sir.</b></p> <p>4     Q How long have you been doing that kind of 5 work?</p> <p>6     A I've done it off and on. Very little of it, 7 frankly. So occasionally I get asked to do it. I 8 actually get asked to do it and very rarely do I take 9 on the engagements.</p> <p>10    Q Okay. As I understand it, you haven't 11 testified in any matter in the last four years; is that 12 right?</p> <p>13    A Not as an expert witness, no, sir.</p> <p>14    Q How long have you had this fee schedule 15 that's page 2 of Exhibit 2?</p> <p>16    A Page 2, Exhibit 2. I believe this would have 17 been put together when I left Kroll. So that would 18 have been right at the beginning of March of 2012.</p> <p>19    Q Did you testify -- or did you review matters 20 to be an expert witness when you worked for Kroll?</p> <p>21    A Yes, sir. This engagement started with 22 Kroll.</p> <p>23    Q So this was put together after you left 24 Kroll, this fee --</p> <p>25    A Yes, sir.</p>	<p>24</p> <p>1     A It's a police pursuit case.</p> <p>2     Q Okay. Where?</p> <p>3     A Jacksonville, Florida.</p> <p>4     Q How many cases have you had in the last four 5 years?</p> <p>6     A I don't know the exact number.</p> <p>7     Q Well, is it more than ten?</p> <p>8     A Over the course of four years?</p> <p>9     Q Yeah.</p> <p>10    A Give me a date you want to start that time 11 clock with, sir.</p> <p>12    Q Well, let's take four years from today. So 13 March of two thousand -- or February of 2009.</p> <p>14    A Well, in February of 2009 I would have been 15 the chief of police in Savannah, so I wouldn't have 16 been taking cases, sir.</p> <p>17    Q You didn't take any cases while you were 18 chief of police there?</p> <p>19    A Not that I recall, no.</p> <p>20    Q And how many have you taken after you left 21 Savannah, then?</p> <p>22    A I don't recall the number. I've looked at a 23 number of cases. I've been asked to take a number of 24 cases. There was a small number of cases that I have 25 taken. And when I accepted the position with the Coast</p>
<p>23</p> <p>1     Q PolicyPartners.com, was that your email at -- 2 at your -- the consulting firm?</p> <p>3     A Yes, sir.</p> <p>4     Q Strategic Policy Partners?</p> <p>5     A Yes, sir.</p> <p>6     Q So you began this engagement when you were 7 working for Kroll; is that right?</p> <p>8     A Yes, sir.</p> <p>9     Q And continued in the Strategic Policy 10 Partners, correct?</p> <p>11    A Yes, sir.</p> <p>12    Q All right. Do you know, do you have any 13 understanding about, why you haven't been asked to 14 testify as an expert in trial or deposition in the last 15 four years?</p> <p>16    A I'm sorry?</p> <p>17    Q Do you know why you -- do you have a belief 18 as to why you have never testified in the last four 19 years?</p> <p>20    A Just haven't taken cases, I don't believe, 21 that have gone to trial or been engaged in matters that 22 have -- where I've been asked to testify.</p> <p>23    Q How many cases do you presently have?</p> <p>24    A Right now I have this one and one other one.</p> <p>25    Q What kind of case is the other one?</p>	<p>25</p> <p>1     Guard, the United States Coast Guard, I removed myself 2 from all the cases that I could ethically.</p> <p>3     Q Okay. (Reporter's Note: Sotto voce communication 5 between Mr. Bennett and Mr. Storms.)</p> <p>6     BY MR. BENNETT:</p> <p>7     Q Have you ever previously provided expert 8 testimony?</p> <p>9     A In what context, sir?</p> <p>10    Q Well, as an expert witness hired under Rule 11 702 of the Federal Rules of Evidence or the state 12 corollary.</p> <p>13    A Have I been hired as an expert witness?</p> <p>14    Q Yeah.</p> <p>15    A Yes, sir.</p> <p>16    Q How many times?</p> <p>17    A I don't recall the exact number, sir.</p> <p>18    Q Have you ever been deposed before?</p> <p>19    A Yes, sir.</p> <p>20    Q As an expert witness?</p> <p>21    A Yes, sir.</p> <p>22    Q Otherwise, other than as an expert witness?</p> <p>23    As a fact witness have you been deposed?</p> <p>24    A Yes, sir.</p> <p>25    Q How many times?</p>

7 (Pages 22 to 25)

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	30		32
1      A I'm not -- I'm not sure I know what you're 2 talking about. No.		1      Q Yes. 2      A No, sir.	
3      Q So you -- are you aware of the related 4 concepts of positional, mechanical, and restraint 5 asphyxia?		3      Q Have you ever been in charge of reviewing or 4 implementing policies in that regard? 5      A Specifically policies about... 6      Not that I recall, no, sir.	
6      A I'm aware that there's a lot of terms that 7 have been used in this case. I certainly have some 8 knowledge of some of those terms.		7      Q Have you ever worked for a police department 8 that had policies reflecting the potential risks of 9 maintaining subjects in a prone position for extended 10 periods of time?	
9      Q Which terms do you have knowledge of?		11     A Can you repeat that, please?	
10     A I would be most familiar with positional 11 asphyxia.		12     MR. BENNETT: Can you read it back, Jane? 13     (The following was read back by the court 14 reporter: 15     "Have you ever worked for a police department 16 that had policies reflecting the potential risks of 17 maintaining subjects in a prone position for extended 18 periods of time?")	
12     Q And when did you first become aware of that 13 as a concept?		19     A I don't recall specific policies about that 20 right now, no, sir. I'd have to review the policy 21 manuals for the different agencies.	
14     A Oh, it's been -- I would guess probably in 15 the very early 1980s.		22     BY MR. BENNETT: 23     Q Do you know if the Minneapolis Police 24 Department officers have received training reflecting 25 the potential risks for -- related to maintaining	
16     Q Positional asphyxia and mechanical asphyxia 17 and restraint asphyxia are kind of talking about the 18 same types of things, aren't they?			
19     A I don't know, sir. I'm trying to be very 20 precise. And so you asked me so what I specifically 21 know, and I'm aware of positional asphyxia, and...			
22     Q Okay.			
23     Are you aware that asphyxia has long been 24 associated with the prone position in terms of police 25 work?			
	31		33
1      A I'm aware that there have been issues about 2 in-custody deaths and there have been questions about 3 why people have ultimately died or been seriously 4 injured during in-custody -- taking people into 5 custody, securing them and moving them, yes, sir.		1      subjects in a prone position for extended periods of 2 time? 3      A I certainly reviewed extensive period -- you 4 know, amount of their training material. I don't 5 recall the precise answer to that question right now, 6 sir.	
6      Q Well, in fact, law enforcement entities 7 nationwide have been training officers about risks 8 associated with maintaining subjects in a prone 9 position for a long time, haven't they?		7      Q Well, you'd be surprised, wouldn't you, if 8 any officer working from, say, 2000 to 2010 for a major 9 metropolitan police force had not learned at least on 10 one occasion about the potential dangers associated 11 with prone positioning and asphyxia? Correct?	
10     A I don't know what you're referring to, sir.		12     A I can't answer that question in that context, 13 sir. As I've explained, there's too many police 14 departments and there is no national standard.	
11     Q You -- so you're not aware of it generally, 12 that law enforcement entities nationwide will train its 13 officers about the risks associated with maintaining 14 the subjects in the prone position?		15     Q Are you aware that police officers have long 16 been trained that the ideal medical position to place 17 positions (sic) in to facilitate breathing is the 18 seated or side recovery position?	
15     A I think that it is difficult to make a 16 statement generally about, quote -- "generally" was the 17 word that you used about law enforcement in the United 18 States. There's 19,000 law enforcement agencies, and 19 so I'm very leery and concerned about the use of the 20 word "generally."		19     A I'm aware of a great deal of discussion. I'm 20 aware of a great deal of --	
21     Q Well, let's ask: Have you ever provided 22 training warning officers about potential risks 23 relating -- related to maintaining subjects in a prone 24 position for extended periods of time?		21     Q How about training? 22     A Am I -- question, sir?	
25     A Provided training?		23     Q Are you aware that officers have been trained 24 that way? 25     A I'm aware that there exists some training for	

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	34	<p>1   <b>that, yes, sir.</b></p> <p>2   Q Do you know if Minneapolis has done that?</p> <p>3   A <b>I don't recall as I sit here, sir.</b></p> <p>4   Q Have you read the depositions of the officers</p> <p>5   of the Minneapolis Police Department, other than</p> <p>6   Callahan and Gorman, that are listed in Exhibit 1?</p> <p>7   A <b>Yes, sir, I did at one point in time.</b></p> <p>8   Q And in fact, every one of those officers,</p> <p>9   every one of them, testified they'd received that</p> <p>10   training, correct?</p> <p>11   A <b>I don't recall that as I sit here now, sir.</b></p> <p>12   Q Okay.</p> <p>13   You and I can agree that an officer's use of</p> <p>14   force must be objectively reasonable under the Fourth</p> <p>15   Amendment, correct?</p> <p>16   A <b>Yes, sir.</b></p> <p>17   Q And that the Minneapolis Police Department,</p> <p>18   like most police departments nationwide, have</p> <p>19   enacted – has enacted policies that mirror the</p> <p>20   use-of-force obligations under the Fourth Amendment,</p> <p>21   correct?</p> <p>22   A <b>I -- I will -- I'm sorry, I can't agree to a</b></p> <p>23   <b>statement about most police departments.</b></p> <p>24   Q Well, how about the Minneapolis Police</p> <p>25   Department?</p>
	35	<p>1   <b>A Yes, sir.</b></p> <p>2   Q Okay.</p> <p>3   And the Minneapolis Police Department has</p> <p>4   provided its officers with training to instruct the</p> <p>5   officers on use of force and the need for such force to</p> <p>6   be objectively reasonable, correct?</p> <p>7   A <b>Yes, sir, I believe they have.</b></p> <p>8   Q The...</p> <p>9   And it has been well and long established</p> <p>10   that an officer's seizure of a subject starts when the</p> <p>11   officer restricts the subject's volitional movements by</p> <p>12   oral commands or physical action and ends when the</p> <p>13   officer either releases the subject or turns the</p> <p>14   subject over to jail or medical personnel; is that</p> <p>15   right?</p> <p>16   A <b>I'll certainly agree with the beginning part</b></p> <p>17   <b>of that statement. I guess the second part, it could</b></p> <p>18   <b>be court or there would be other -- it depends on how</b></p> <p>19   <b>you want to define "jail." Custody facilities, court</b></p> <p>20   <b>facilities.</b></p> <p>21   Q Some other custodial facility or medical</p> <p>22   personnel?</p> <p>23   A <b>Or -- or their probable cause to arrest has</b></p> <p>24   <b>evaporated. Or if it's a mental hygiene arrest and</b></p> <p>25   <b>they've seized someone pursuant to mental hygiene</b></p>
	37	<p>1   <b>well-known in the industry. You make all sorts of --</b></p> <p>2   <b>you make all sorts of representations in your report,</b></p> <p>3   <b>which we'll go into, that what is inside contemporary</b></p> <p>4   <b>police thinking, training and practice, and -- and what</b></p> <p>5   <b>is generally -- what is consistent with generally</b></p> <p>6   <b>accepted practices and procedures. And it is part of</b></p> <p>7   <b>those generally accepted practices and procedures that</b></p> <p>8   <b>establishes the duty to monitor the medical condition</b></p> <p>9   <b>of a subject that has forced -- that force has been</b></p> <p>10   <b>used on, correct?</b></p> <p>11   A <b>I can't agree with that statement as you're</b></p> <p>12   <b>stating it, no, sir.</b></p> <p>13   Q Okay. Okay.</p> <p>14   You don't agree that officers must monitor</p> <p>15   things like consciousness of the people they've used</p> <p>16   force on?</p> <p>17   A <b>Sure. Absolutely.</b></p> <p>18   Q How about whether they're -- they're</p> <p>19   respirating, breathing?</p> <p>20   A <b>Breathing. Yes, sir.</b></p> <p>21   Q Whether they're bleeding?</p> <p>22   A <b>Absolutely. Yes, sir.</b></p> <p>23   Q Whether they've suffered any dangerous or</p> <p>24   life-threatening injuries?</p> <p>25   A <b>Absolutely. Yes, sir.</b></p>

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	38		40
<p>1 Q Whether they've suffered any injury that 2 requires the intervention of professional medical 3 personnel?</p> <p>4 A I think you would have covered that in the 5 breathing or bleeding.</p> <p>6 Q Well, he could be -- he could be breathing 7 and not -- not bleeding and having a stroke, for 8 example, couldn't you? Or an ascending aortic aneurysm 9 or a heart attack, right?</p> <p>10 A I'm not a medical personnel, sir, but if -- I 11 believe if you -- what you're describing, the symptoms 12 would be so obvious that there would be a clear need to 13 get medical attention, yes, sir.</p> <p>14 Q And medical monitoring requires an active 15 analysis on the -- on the part of the officer, does it 16 not?</p> <p>17 A I -- you use the phrase "medical monitoring," 18 and I'm not quite sure what you mean by that.</p> <p>19 Q Well, monitoring -- monitoring a person's 20 respiration, consciousness, and whether or not they're 21 injured requires a certain level of vigilance on the 22 part of the officer. Would you agree?</p> <p>23 A Monitoring someone. Let's agree on the word 24 of "monitoring."</p> <p>25 Q Yeah.</p>		<p>1 been used, correct?</p> <p>2 A In a -- in a general broad term, yes, sir.</p> <p>3 Q Okay.</p> <p>4 A "Vigilant" is a conclusion.</p> <p>5 Q Well, then let's not use vigilant. You 6 should -- you have to be paying at least enough 7 attention to observe whether or not a subject is 8 conscious?</p> <p>9 A You should be paying attention to the people 10 you've arrested to make sure that -- people that are in 11 your custody to make sure that they are not as we just 12 discussed.</p> <p>13 Q Okay.</p> <p>14 Now, Exhibit 1, your -- you wrote a 22 -- 15 that's a 22-page report, and I think there were 73 16 footnotes. Is that right?</p> <p>17 A Yes, sir, 22 pages. And yes, sir, 73 18 footnotes.</p> <p>19 Q And, Mr. Berkow, it appears to me that in -- 20 that within those -- that report, the 22 pages and the 21 73 footnotes, that there's no mention of or -- of 22 several issues critical to a Fourth -- to any Fourth 23 Amendment analysis of the conduct of Officers Gorman 24 and Callahan. Do you know what those issues are?</p> <p>25 A I -- I don't understand your question, sir.</p>	
<p>1 A "Medical monitoring" I have trouble with, 2 because "medical monitoring" could have a wide variety 3 of applications.</p> <p>4 Q Sure. But for the police officer, what 5 applications are -- if you're using force on a subject, 6 what are you monitoring, if you're a police officer?</p> <p>7 A You're monitoring the subject just as you 8 described: To make sure that they're breathing, 9 they're not bleeding, they don't have some serious 10 injury that requires immediate medical attention.</p> <p>11 Q And that requires that the officer pay 12 attention to those things, does it not?</p> <p>13 A Yes, it does.</p> <p>14 Q It requires a certain level of vigilance, 15 does it not?</p> <p>16 A I'm not sure I would use the word 17 "vigilance," but a certain amount of attention.</p> <p>18 Q Well, you don't want the officers -- I mean, 19 there may be situations certainly where they have to 20 pay attention to extraneous things, like if there's 21 someone who might endanger them near the -- near the 22 event, correct?</p> <p>23 A Yes, sir.</p> <p>24 Q But if the -- absent that, they should be 25 paying attention to the subject upon whom force has</p>	39		41

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	42		44
1	MR. OSBORNE: Good, because it isn't now.	1	A Let me just -- I'll just look at the actual
2	MR. BENNETT: Look -- look -- it doesn't have	2	Exhibit 37, if you don't mind.
3	to be now. And I don't have to make it clear to you,	3	Q Sure.
4	Burt.	4	A May I grab this?
5	MR. OSBORNE: No, I know, but --	5	Q Sure.
6	BY MR. BENNETT:	6	A Yes, sir, the quote is here.
7	Q If you -- you start citing it on footnote	7	Q Okay.
8	number 14. So if you'd find footnote number 14. Do	8	23? I guess we just did 23.
9	you see where you start there with "Callahan's"?	9	25?
10	A Yes, sir.	10	A We just -- we just did 19.
11	Q Okay. And what you're citing to is	11	23 --
12	Exhibit 37; is that right?	12	Q 19 and 21, excuse me.
13	A I don't know what Exhibit 37 is, sir.	13	A 21.
14	Q That's Callahan's statement to Sergeant Klund	14	Q "See statement of Officer Callahan."
15	on the 15th of September 2010.	15	A Yes, sir.
16	A I believe it's a supplement of this other	16	Q 23, "See statement of Officer Callahan"?
17	sergeant, Erick Fors.	17	And you're citing about the facts of the --
18	Q Well, but it's a statement of Officer Tim	18	of what Mr. Smith was able to do and what he was -- and
19	Callahan. Do you see that?	19	what he was -- for example, 23 is a footnote to the
20	A Yes, sir.	20	following sentence: "Officer Callahan subsequently
21	Q Isn't that how you cite it?	21	drew his TASER, activating his TASER video, and he
22	A Yes, sir.	22	removed one of his hands from Mr. Smith to do so.
23	Q And did you cite it in footnote 13?	23	Mr. Smith was able to get his" -- "get to his feet and
24	A 13? No, sir.	24	momentarily break free from the officers, run away,"
25	Q Oh, excuse me. 14?	25	footnote 23, and you're referring to his statement.
	43		45
1	A 14, yes, sir.	1	Correct?
2	Q 15?	2	A I believe so. I'm looking to see if I can
3	A 15, yes, sir.	3	find it in the statement, sir.
4	Q 16?	4	Q Well, I -- I'm just looking at your report.
5	A Yes, sir.	5	So you don't -- you can look -- I'll refer you
6	Q 17?	6	specifically to the statement, but you did make a
7	A No, sir.	7	reference to the statement for that fact, correct?
8	Q Yeah, well, look at 17. "See also statements	8	A On -- on 23?
9	of Officers Callahan and Gorman." That's what you're	9	Q Yeah, on page 9, footnote 23.
10	referring to there, when you say "See also"?	10	A Yes, sir.
11	A Let me read the...	11	Q Then you go to page 10, footnote 25, you cite
12	I could be referring to this or I could be	12	Callahan statement for the fact that at that time
13	referring to their deposition testimony.	13	Mr. Smith was able to punch Officer Callahan in the
14	Q You -- but if you're --	14	face, paren, jaw, close paren, and that Callahan was
15	A It's covered in both places, that -- those	15	unable to block the punch, as he had one hand on Smith
16	comments.	16	and the other hand was holding his TASER, and then you
17	Q Okay. But a statement would be Exhibit 37,	17	cite his statement again, correct?
18	correct?	18	A Yes, sir.
19	A Could be, yes, sir.	19	Q 26 is a footnote about what Mr. Smith did,
20	Q All right. Same thing with 18?	20	and the -- and the -- and the attempts to handcuff him;
21	A Yes, sir.	21	is that right?
22	Q 19?	22	A Yes, sir.
23	A Yes, sir.	23	Q 27 is a further description by Callahan of
24	Q 21? That's what you're referring to,	24	the struggle, correct, footnote 27?
25	Exhibit 37? To Erick Fors?	25	A I'm just looking for it, sir.

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<p>46</p> <p>1 Yes, sir.      2 Q And that -- and that goes to about to the      3 physical conditioning?      4 A Well, footnote -- hang on a second. Footnote      5 27 --      6 Q Physical positioning, excuse me.      7 A Footnote 27 is about Gorman, not about --      8 Q But -- but what you're doing is that Officer      9 Callahan describes what Officer Gorman did in his      10 statement, correct? That's an Id cite?      11 A It is. And then it says, "And --      12 Q "See statement of" --      13 A -- "see statement of Gorman."      14 Q Okay. And that's Exhibit 39?      15 A So that would be a different exhibit, yes,      16 sir.      17 Q Yep. All right.      18 Then go to page 12. Footnote 36 you cite the      19 statement of Officer Callahan again?      20 A What -- which footnote?      21 Q 36.      22 A 36? Just a second, I have to find it.      23 Yes, sir.      24 Q And 41 on page 14. Again, you cite the      25 statement of Officer Callahan. Footnote 41.</p>	<p>48</p> <p>1 depositions from you or in other reports, that I don't      2 recall exactly where I've seen it as I sit here.      3 But --      4 Q Well, it isn't in your report, is it?      5 A I'd have to reread my report precisely,      6 but --      7 Q All right. Do you want to take the time to      8 do that right now? It's fine with me.      9 A It's up to you, sir.      10 Q All right. We'll take a break. You read it.      11 VIDEOGRAPHER: Off the video record at      12 9:55 a.m.      13 (Recess taken.)      14 VIDEOGRAPHER: We're back on the video      15 record. It is 10:06 a.m.      16 BY MR. BENNETT:      17 Q Mr. Berkow, you've had now an opportunity to      18 read through your own report again, correct?      19 A Yes, sir.      20 Q And there is no citation to any of the      21 language in Exhibit 37, page 5, that I read on the      22 record before we broke, correct?      23 A There is no specific cite to that paragraph,      24 no, sir.      25 Q Well, there's no specific cite in the</p>
<p>47</p> <p>1 A Yes, sir. Yes, sir.      2 Q Okay.      3 Now, I didn't read anywhere in your report --      4 and so that's four -- that's -- what did I say? That's      5 13 times you cited him. Did you ever mention or -- or      6 cite in your 22-page, 73-footnote document the      7 following language from the same exhibit, Exhibit 37,      8 talking about that, "And it was at this point we were      9 able to get his arms fully behind his back and      10 handcuffed together. It was also at this time that      11 Smith seemed to calm down a bit and was not resisting      12 as hard. I believed that Smith was giving up at this      13 time and complying"?      14 Does that appear in Exhibit 1 at all? Any      15 citation to that?      16 A I don't recall. You didn't just point it out      17 to me, though, sir.      18 Q Well, I -- I --      19 A I can certainly read the whole thing again.      20 Q Well, you read it -- you read your report to      21 get ready for your deposition today. You said that.      22 A Yes, sir.      23 Q Did you read that in that?      24 A At this point in time I have seen that      25 statement cited so many times, whether it's been in</p>	<p>49</p> <p>1 language regarding stopped -- stopping resisting,      2 compliance, and giving up. Does not appear in your      3 report, correct?      4 A Those specific words do not.      5 Q Those were the specific words of Officer Tim      6 Callahan the first time he was asked about this,      7 though, correct?      8 A I don't know if it was the first time. It      9 was the first time he was formally interviewed.      10 Q Okay. Well, it's the first interview of him      11 that you can look at?      12 A Yes, sir.      13 Q All right. The first one I can look at and      14 the first one the jury will be able to look at,      15 correct?      16 A Best of my knowledge, yes, sir.      17 Q He's represented by counsel?      18 A Yes, sir.      19 Q And would it be correct to say that a Fourth      20 Amendment analysis of use of force would necessarily      21 include the fact when the officer using the force      22 perceived that the subject of the -- a force was giving      23 up, complying, not resisting?      24 A Yes, I think that would absolutely be a      25 factor.</p>

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<p style="text-align: right;">50</p> <p>1 Q They are critical factors, aren't they?      2 A I think it is absolutely a factor.      3 Q Well, let's just take an example outside of      4 this case, because I think it's so stark and so real.      5 I could show you the videotape of it, for example.      6 The police officers are engaged in a chase of      7 a person they believe may have a gun. They're chasing      8 him in squads and on foot. Okay? Do you have that in      9 mind?</p> <p>10 A Yeah, it's a foot chase or a car chase?      11 Q Both. Well, the police are in cars and on      12 foot. And the perpetrator, the suspect, is on foot.      13 A Okay, sir.      14 Q He runs, he gets -- runs to kind of a      15 dead-end alley, tries to climb a large chain-link      16 fence, realizes he's not going to get across. Turns      17 around. Puts his hands up in the air --      18 MR. BENNETT: Like this, Jayme.      19 (Demonstrating.)      20 BY MR. BENNETT:      21 Q So his hands are visible to all officers and      22 the squad video. Okay?      23 A Yes, sir.      24 Q Would you -- would you recognize that as a      25 sign of surrender and acquiescence to police authority?</p>	<p style="text-align: right;">52</p> <p>1 giving up or at least your use of forces are      2 restricted, correct?      3 A The use of all force is judged by a standard      4 of is it objectively reasonable.      5 Q Yeah. And it is objectively unreasonable to      6 use force of any significance on a person that is      7 giving up, correct?      8 A I think "giving up" covers a lot of ground,      9 so you'd have to give me specific facts to -- to answer      10 that.      11 Q It was on the video, right? You saw the      12 video of David Smith?      13 A I'm sorry, you were pointing at something and      14 then asking me a different question.      15 Q Exhibit 37 is what I'm pointing at.      16 A Yes, sir.      17 Q Paragraph 5.      18 A Yes, sir.      19 Q Callahan's own words.      20 A Yes, sir.      21 Q Callahan perceives subjectively that David      22 Smith is giving up and complying; doesn't he state      23 that?      24 A That is not what he states.      25 Q All right. Let's just -- let's read exactly</p>
<p style="text-align: right;">51</p> <p>1 A Yes, sir, that certainly suggests that, yeah.      2 Q So it would then be improper under any      3 reasonable Fourth Amendment analysis for the officers      4 to strike him in the head several times, kick him and      5 hit him with ASP while his hands are up in the air,      6 correct?      7 A I don't know all the facts. Sounds like      8 you're relating a very specific case.      9 Q I am.      10 A But the fact pattern as you've described it,      11 with that limited, absolutely.      12 Q Well, I'm just describing what was on the      13 video.      14 MR. OSBORNE: Well, he hasn't seen the video      15 you're talking about, Bob. I mean, you know, he's      16 trying to answer the best he can.      17 A You're asking me a hypothetical with a      18 limited set of facts.      19 BY MR. BENNETT:      20 Q I am. But the key to that is his hands in      21 the air, compliance, acquiescence, stopping flight, and      22 stopping any fighting. Correct? Putting your hands      23 up, giving up, is really important, isn't it?      24 A Giving up is absolutely a factor.      25 Q You cannot use force on somebody who is</p>	<p style="text-align: right;">53</p> <p>1 what he states.      2 Beliefs are subjective, right?      3 A Pardon me?      4 Q Beliefs are subjective as opposed to      5 objective. Correct? What he -- what he states -- do      6 you agree that beliefs are subjective?      7 A I'm not sure I understand what you're asking      8 me about, sir.      9 Q Well --      10 A You're jumping from --      11 Q Well, do you know the difference between      12 objective and subjective?      13 A Yes, sir.      14 Q What's subjective?      15 A Subjective is what I -- if I believe, for      16 example, that you're hostile or you're --      17 Q All right.      18 A Conclusionary statements.      19 Q And the question is would an objective review      20 of the same facts come to that conclusion. That's a      21 different -- that's an objective review, correct?      22 A I'm sorry, say that once more?      23 Q If -- if other people looking at the same      24 facts would believe that to be true is -- is an      25 objective analysis?</p>

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	54		56
1      A I believe it's the hypothetical reasonable		1      BY MR. BENNETT:	
2 person, sir.		2      Q And whether a person is adequately controlled	
3      Q Correct. All right.		3 by handcuff is important to a Fourth Amendment	
4      Well, Callahan, first time he talks about it		4 analysis, isn't it?	
5 on recorded with his attorney, says, "And it was at		5      A I'm not sure what he means -- that's -- first	
6 this point we were able to get his arms fully behind		6 of all, you're showing me one snippet of a very long	
7 his back and handcuffed together."		7 deposition. I'm not sure --	
8      Do you know where that is in the video?		8      Q Did you -- did you read that snippet?	
9      A Where they get him handcuffed?		9      A Did I read that snippet now?	
10     Q Yeah. Do you have that in mind in the video?		10     Q Yeah.	
11     A What do you mean by that, have in mind?		11     A Just now?	
12     Q Do you have a visual recollection of them		12     Q And --	
13 getting him handcuffed and his hands behind his back?		13     A Yes, sir, I did.	
14     A I have a recollection there's a point in time		14     Q And did you read it when you read his	
15 in the videos where, yes, they do.		15 deposition?	
16     Q And he says, "It was also at this time that		16     A At some point in time, yes, sir, I did.	
17 Smith seemed to calm down a bit and was not resisting		17     Q So you read the whole context of the	
18 as hard. I believed that Smith was giving up at this		18 deposition?	
19 time and complying."		19     A Yes, sir.	
20     I read that correctly, didn't I?		20     Q You didn't cite that portion or note in your	
21     A You read the statement, yes, sir.		21 report that he -- that Callahan believed he was	
22     Q All right. Those are Callahan's words, not		22 adequately controlled?	
23 words anybody else picked. Those are his words?		23     A There's a number of things I didn't cite	
24     A Yes, sir.		24 specifically.	
25     Q All right. So compliance and giving up are		25     Q I know. And I want to talk about those --	
	55		57
1 important concepts in any Fourth Amendment analysis; we		1      A But I --	
2 agreed on that, right?		2      Q -- things in particular.	
3      A Yes, sir.		3      I agree. I just want to figure out if it was	
4      Q Did you -- and I note also that you didn't		4 by mistake or on -- or by conscious choice.	
5 cite in -- in your 22-page, 73-footnote report the fact		5      The -- let me ask you this. This is the	
6 that Officer Callahan also said that he believed that		6 training officer, Sergeant Anderson.	
7 David Smith was adequately controlled by handcuffing.		7      (Video clip shown of the following questions	
8 He did testify to that, didn't he?		8 and answers from the October 2, 2012 testimony of	
9      A I don't recall that specific sentence, sir.		9 Sergeant Brian Anderson:	
10     Q All right.		10     "Was it consistent with MPD training prior to	
11     (Reporter's Note: Sotto voce communication		11 September 9, 2010 to kneel on a subject's back for	
12 between Mr. Bennett and Mr. Storms.)		12 approximately four and a half minutes after the subject	
13 BY MR. BENNETT:		13 had been adequately controlled?	
14     Q You might want to take a look.		14     "No.")	
15     (Video clip shown of the following questions		15     (End of video clip.)	
16 and answers from the January 30, 2012 testimony of		16     BY MR. BENNETT:	
17 Officer Timothy Callahan:		17     Q Did you read Sergeant Anderson's deposition,	
18     "Well, was David Smith a subject who was not		18 the Rule 30(b)(6) deposition?	
19 adequately controlled by handcuffing?		19     A At some point, yes, sir, I have.	
20     "No. I would say that once we had him		20     Q He was the training expert officer?	
21 handcuffed, we had him --		21     A Yes, sir.	
22     "Adequately controlled?		22     Q All right. And was that statement by Officer	
23     "I -- I -- I think so."		23 Anderson -- or Sergeant Anderson, excuse me, was that	
24     (End of video clip.)		24 consistent -- was his testimony consistent with	
25		25 generally accepted practices and procedures of properly	

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1 trained and prudent law enforcement officers? 2 A I'm not sure I can answer your question the 3 way you're asking -- 4 Q Why? 5 A -- sir. 6 Pardon me? 7 Q What's wrong with my question? 8 A Well, to start with, the way you phrased the 9 question to him, it was "kneeling on." 10 Q Yeah. 11 A You'd have to define for me what you mean by 12 "kneeling on." 13 Q You saw Gorman kneeling on him, didn't you? 14 A I did not. 15 Q You didn't? 16 A No, sir. 17 Q Really? 18 A No, sir. 19 Q What did you see? 20 A I saw Gorman with a knee on him. That's why 21 I'm saying, let's define "kneeling." 22 Q What -- what is kneeling? You've got to have 23 both knees down? Like some Catholics have one knee 24 down in church and some have two. So what -- is 25 there -- I mean, is one not kneeling and one is?	58	1 at his -- his testimony again. 2 Q Okay. All right. 3 Look at this. 4 So you don't -- you don't think that -- is it 5 your position that Sergeant Anderson's answer there was 6 not consistent with generally accepted -- and I'm using 7 the words from your own report -- generally accepted 8 practices and procedures of properly trained and 9 prudent law enforcement officers? 10 A Officer Anderson is responding to a question 11 from you, sir. It's not clear to me that -- what 12 you're talking about in terms of kneeling, and so -- 13 Q Is his answer consistent with generally 14 accepted practices or procedures of properly trained 15 and prudent law enforcement officers? 16 A You'd have to explain to me exactly what 17 you're -- you expected him -- 18 Q If you want to say no, say no, if you want to 19 say yes, say yes, but give me an answer. 20 A I'm giving an answer, sir. 21 Q You heard his testimony. Based solely on his 22 testimony, is it true or not true? 23 A His testimony is responsive to the way you 24 phrased the question and his understanding. I can't 25 tell you what was in his head.	60
1 A I would -- to me, "kneeling" is -- has a 2 specific meaning that you are -- both knees are on 3 someone -- 4 Q Oh. 5 A -- and -- and so I think there's been some 6 lack of clarity in -- 7 Q Oh, really. 8 A -- some of the questioning. 9 Q I see. 10 Did you ever see Gorman with both knees on 11 him? 12 A From the video, it appears he switches knees. 13 Q Did you ever see him with both knees on him? 14 A There may have been a second while he's 15 switching knees, yes, sir. 16 Q So then he'd be kneeling on him? 17 A Yes, sir. 18 Q Would you agree that he kept -- 19 A He'd have both knees on him for a period of 20 time. 21 Q Well, you read Gorman's deposition, right? 22 A Yes, sir. 23 Q He says he was kneeling on him for four and a 24 half minutes with one or both knees, correct? 25 A I -- I don't recall that. I'd have to look	59	1 MR. STORMS: Well, his attorney didn't object 2 as vague, and I asked the question. It seemed like he 3 understood the answer and his attorney obviously did. 4 BY MR. BENNETT: 5 Q You don't understand the question? 6 A I'm not testifying for him, sir. 7 Q All right. Well, all I'm asking is you say a 8 number of things that are consistent with -- 9 MR. OSBORNE: And I don't always object when 10 questions are vague. I mean, you know, otherwise I'd 11 be objecting a lot more. 12 BY MR. BENNETT: 13 Q So you don't have an opinion one way or 14 another whether that -- whether Sergeant Anderson's 15 testimony in that specific instance is consistent with 16 generally accepted practices and procedures of properly 17 trained and prudent law enforcement officers? Is that 18 correct? You don't have an opinion? 19 A My answer is that from the question that 20 you've asked him, I'm not clear what he's responding 21 to, because you and I have already established we don't 22 agree what "kneeling" means. 23 Q Okay. 24 A You used it in a different way than I would 25 use it.	61

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	62		64
1	Q All right. Let's see.	1	"I know that the last time I activated the
2	(Video clip shown of the following questions	2	TASER was the time prior to we -- us handcuffing him.
3	and answers from the October 2, 2012 testimony of	3	"All right. So once the -- the last TASER
4	Sergeant Brian Anderson:	4	cycle immediately precedes the final handcuffing?
5	"Well, he just gave you a hypothetical that	5	"Yes.
6	was pretty clear, though. If the person was cuffed and	6	"Correct? And one -- you said, 'It was also
7	had given up and was complying. Right, Jeff?"	7	at this time...' And I assume you're meaning in this
8	MR. BENNETT: That's Mr. Osborne.	8	answer at the time you got him handcuffed -- 'that
9	("Would it be consistent with policy to	9	Smith seemed to calm down a bit.' You said that,
10	continue kneeling on that person's back for four	10	right?
11	minutes and 30 seconds?	11	"I did say that.
12	"No.	12	"And he was not resisting as hard?
13	"Okay. Would it have been consistent with	13	"Yes.
14	training prior to September of 2010 to continue	14	"And you believed that Smith was giving up at
15	kneeling on a subject's back under those circumstances?	15	this time and complying, correct?
16	"No."	16	"Yes.
17	(End of video clip.)	17	"And when a person does that the excuse for
18	BY MR. BENNETT:	18	force abates? Ends? Correct?
19	Q Now, let's forget your -- whatever your	19	"Yes.")
20	interpretation. Let the jury decide what's kneeling,	20	(End of video clip.)
21	if you have to -- if you have -- if it's a two-knee	21	BY MR. BENNETT:
22	requirement or a one-knee requirement.	22	Q Do you agree with Officer Callahan?
23	The...	23	A Generally, yes.
24	Is Sergeant Anderson's answer, the training	24	Q Okay. And that is -- Officer Callahan's
25	officer, is it consistent with generally accepted	25	answers are consistent with generally accepted
	63		65
1	practices and procedures of properly trained and	1	practices and procedures of properly trained and
2	prudent law enforcement officers facing similar	2	prudent law enforcement officers facing similar
3	circumstances?	3	circumstances, correct?
4	A If you're referring to full kneeling --	4	A Generally, yes, sir.
5	Q I'm -- I'm -- there's no full kneeling. The	5	Q Okay.
6	question and answer as asked.	6	How do you define "kneeling"? I want to
7	A Then I cannot answer the question as asked.	7	get -- you give me your definition of kneeling, because
8	Q All right. That's fine. You don't have an	8	I don't -- I don't -- want to be sure that I understand
9	opinion, then. All right. That's fine.	9	exactly what you mean.
10	(Video clip shown of the following questions	10	A In the context of this case?
11	and answers from the January 30, 2012 testimony of	11	Q No. I mean what does the word "kneeling"
12	Officer Timothy Callahan:	12	mean?
13	"And you said, 'I know I activated it at	13	A I think "kneeling" can have a variety of
14	least one more time.' And that would have been the	14	meanings, depending on the context.
15	final time? You had five cycles in your TASER,	15	Q Oh. Okay.
16	correct?	16	Well, what about the context of -- well, you
17	"I believe I was told that there were five	17	tell me what your -- what you understand the word
18	cycles.	18	"kneeling" to mean.
19	"I can show you the TASER record, and you	19	A Again, I think "kneeling" can have a variety
20	wouldn't deny --	20	of meanings, depending on the context. So if I'm in a
21	"I don't disagree.	21	firearm shooting course, there are different kneeling
22	"Okay. And you say, 'It was at this point	22	positions, and you define them and you say, okay, a
23	that we were able to get the arms fully behind his back	23	single-kneel kneeling position, a two-knee kneeling
24	and handcuffed together,' correct? That's what you	24	position. So there are different positions, but the
25	said?	25	term "kneeling" is used for both sets of circumstances.

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<p style="text-align: right;">66</p> <p>1 They have different practical -- practical, visible, 2 real meaning.</p> <p>3 Q Really.</p> <p>4 A Yes, sir.</p> <p>5 Q Well, you know all the officers that were 6 questioned about kneeling in this case saw the videos, 7 don't you?</p> <p>8 A I don't know that at all.</p> <p>9 Q Did you see the video?</p> <p>10 A Yes, sir.</p> <p>11 Q Did you know what I meant by "kneeling"?</p> <p>12 A Do I know what you meant by "kneeling"?</p> <p>13 Q Correct.</p> <p>14 A No, sir. We've never talked until today.</p> <p>15 Q Well, let's assume I meant the kneeling 16 that's depicted on the videos.</p> <p>17 A Okay, sir.</p> <p>18 Q That would be a kneeling like a single-knee 19 kneeling like you talked about for shooting, right?</p> <p>20 A Yes, sir.</p> <p>21 Q And why do you do -- why do you use a 22 single-knee position in shooting?</p> <p>23 A It's a stabilized position --</p> <p>24 Q Correct.</p> <p>25 A -- basically.</p>	<p style="text-align: right;">68</p> <p>1 Q Well, a lot of times --</p> <p>2 A That would be my belief as to whether or not 3 he understood it.</p> <p>4 Q A lot of times when the answers are damning, 5 they hesitate a bit, don't they?</p> <p>6 MR. OSBORNE: Objection; argumentative.</p> <p>7 A Is that a question for me?</p> <p>8 BY MR. BENNETT:</p> <p>9 Q Yeah.</p> <p>10 A I think there are a variety of reasons why 11 people could hesitate before answering the questions.</p> <p>12 Q Okay.</p> <p>13 A Make sure they understand the wording, make 14 sure they understand the context.</p> <p>15 Q Conceive of the answer in their head?</p> <p>16 A Sure.</p> <p>17 Q Okay.</p> <p>18 But the answer he gave was unequivocal, 19 "Yes," wasn't it?</p> <p>20 A Yes, sir.</p> <p>21 Q And neither Officer nor Officer ~ neither 22 Officer Callahan nor Officer Gorman describe any 23 resistant behavior after Gorman hits him in the head, on the video?</p> <p>25 A I'm not sure that I see a hit to the head, so</p>
<p style="text-align: right;">67</p> <p>1 Q You use the knee to stabilize, correct?</p> <p>2 A Well, it's stabilizing or you're behind 3 cover. There can be a variety of reasons.</p> <p>4 Q Okay.</p> <p>5 And the reason for force abates when a person 6 gives up is a common, critical law enforcement 7 principle in terms of Fourth Amendment analysis, 8 correct?</p> <p>9 A When they give up?</p> <p>10 Q Yeah.</p> <p>11 A Surrender? Yes, sir.</p> <p>12 Q Yeah. Comply.</p> <p>13 A Yes, sir.</p> <p>14 Q And you know that Mr. Callahan -- you -- did 15 you know that's -- you looked at Officer Callahan 16 there, right?</p> <p>17 A Looked at him on the video? Yes, sir.</p> <p>18 Q He understood, he didn't indicate any lack of 19 knowledge about my questions, did he?</p> <p>20 A I would be speculating as to whether he --</p> <p>21 Q Well, in the answer you just saw, did he have 22 any problem understanding my questions?</p> <p>23 A I noticed some significant hesitation before 24 he answered, but he certainly answered them. So I 25 would --</p>	<p style="text-align: right;">69</p> <p>1 you'll have to take me through where you're -- you're 2 timing that and what you mean by that, sir.</p> <p>3 Q You never -- you didn't see a hit on the 4 head?</p> <p>5 A Not an unequivocal hit, yes, no, sir, I did 6 not.</p> <p>7 Q Well, didn't Officer Gorman try that in his 8 deposition, that -- say it was unequivocal, and then he 9 just gave up after I showed him the video three times? 10 Do you remember that?</p> <p>11 A I'd be -- I'm not aware of what he said in 12 his -- I don't recall what he said in his video -- in 13 his --</p> <p>14 Q Well, his deposition --</p> <p>15 A -- deposition. Excuse me.</p> <p>16 Q Well, if I described that accurately, you 17 don't -- you don't remember that? He tried to say, 18 well, it was kind of a light cuff, it was this or that, 19 and then he said, "Well, I actually did hit him." Do 20 you remember that?</p> <p>21 A I recall a discussion, an extended 22 discussion, about that, but I don't recall what his 23 specific answers were.</p> <p>24 Q You don't mention Gorman hitting him in the head, do you, in your report?</p>

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	70		72
1      A I just said I don't see it, an unequivocal		1      the tape where it is clear that Tim Callahan takes	
2 hit to the head. I've certainly read a lot of		2 David Smith's pulse?	
3 testimony about something. Again, I think words are		3      A I don't believe that is the accurate	
4 important. "Hit" has a very --		4 statement of what occurred.	
5      Q Words are important. How about the word		5      Q Oh, really? So you didn't cite their	
6 "motherfucker"? Is that important?		6 testimony that admits that?	
7      A Yes.		7      A I'm not sure what you're referring to, sir.	
8      Q Okay. Did you hear the word "motherfucker"		8      Q Okay.	
9 on the tape?		9      Does -- do the words "recovery position"	
10     A Yes, sir.		10 appear in your report?	
11     Q And who was that used by and who was it used		11     A I don't believe so, no, sir.	
12 to?		12     Q Do you know what a recovery position is, or	
13     A I believe it was used by Officer Callahan.		13 is that a little like kneeling?	
14     Q And who was he calling a "motherfucker"?		14     Well, that's argumentative. Forget it.	
15     A He -- I believe he was directing it to		15     Do you know -- do you know what the word --	
16 Mr. Smith.		16 what the words "recovery position" mean in police	
17     Q Okay. And do you find that to be a term of		17 vernacular?	
18 endearment? Have you felt that over the years?		18     A I've certainly heard it used in this case and	
19     MR. OSBORNE: Objection; argumentative.		19 seen discussion of it in this case, yes.	
20     MR. BENNETT: Really?		20     Q Have you heard it -- have you seen it in the	
21     MR. OSBORNE: Yeah.		21 training videos done by the New York medical examiner?	
22 BY MR. BENNETT:		22     A I don't believe so, no, sir.	
23     Q Is it a term of endearment, "motherfucker"?		23     Q Okay. Have you -- have you seen it in	
24     A Generally, no.		24 connection with training materials relating to excited	
25     Q Okay. In fact, it implies some animus, does		25 delirium?	
	71		73
1      it not, some -- some anger?		1      A The specific phrase "recovery position"?	
2      A It can, certainly.		2      Q Correct.	
3      Q Okay.		3      A Not that I recall, no, sir.	
4      A Again, context is important. But certainly		4      Q Have you seen it in the TASER training	
5 can. Absolutely.		5 materials and manual?	
6      Q Okay. Did you cite anywhere in the testimony		6      A "Recovery position"?	
7 of, in your report from Officers Gorman and Callahan		7      Q Correct.	
8 that -- that -- where both of them agree that they did		8      A Not that I recall.	
9 nothing to actively monitor the level of consciousness		9      Q Okay.	
10 or respiration of David Smith until the first time that		10     Did you look at the -- did you cite the	
11 Tim Callahan takes his pulse?		11 testimony of now Police Chief Janee Harteau in any of	
12     A I'm sorry, repeat that question, sir. It has		12 your 73 footnotes?	
13 a lot of pieces.		13     A I don't believe so, no, sir.	
14     MR. BENNETT: Can you read it back?		14     Q How about the testimony of Captain Amelia	
15     (The following was read back by the court		15 Huffman?	
16 reporter:		16     A I don't -- I don't recall exactly. I don't	
17     "Did you cite anywhere in the testimony, in		17 think so, no, sir.	
18 your report, from Officers Gorman and Callahan		18     Q How about the testimony of Sergeant Brad	
19 that" --)		19 Anderson, the Rule 30(b)(6) training representative of	
20     MR. BENNETT: I'll start over, because I...		20 the Minneapolis Police Department?	
21 BY MR. BENNETT:		21     A I might have cited him, didn't I? I don't	
22     Q Did you cite anywhere in the text of your		22 recall. I'd have to look. If you'd like, I'll look.	
23 report the testimony of Officer Callahan and Officer		23     Q Go ahead and look.	
24 Gorman that they did nothing to actively monitor David		24     MR. OSBORNE: Bob, I think you called him	
25 Smith's consciousness or respiration until the time on		25 Brad Anderson. I think it's Jason.	

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	74		76
1	MR. BENNETT: No. Jason Case, isn't it?	1	of that water while we're...
2	It's Brad Anderson.	2	MR. BENNETT: Sure. Let's go off the record.
3	MS. BENNETT: Brian.	3	VIDEOGRAPHER: Off the video record at
4	MR. BENNETT: Brian Anderson?	4	10:33 a.m.
5	MR. OSBORNE: Brian. We're both wrong.	5	(Off the record.)
6	MR. BENNETT: Okay. That wouldn't surprise	6	VIDEOGRAPHER: We are back on the video
7	me, that we were both wrong.	7	record at 10:33 a.m.
8	Can we -- well, I'm sorry.	8	BY MR. BENNETT:
9	BY MR. BENNETT:	9	Q Did you look at any of the depositions as
10	Q It's Brian Anderson.	10	well?
11	A Yeah, I understand, sir.	11	A Look at the video of them?
12	No, sir, I did not.	12	Q Yeah.
13	BY MR. BENNETT:	13	A No, sir.
14	Q What about Lieutenant Zimmerman?	14	Q You just read them?
15	A Not that I recall, no, sir.	15	A Yes, sir.
16	Q How about now Deputy Chief Glampe, was then	16	Q Let me show you this one.
17	the IA supervisor?	17	(Video clip shown of the following questions
18	A Not that I recall, sir.	18	and answers from the October 5, 2012 testimony of
19	Q How about the depo testimony of Erick Fors?	19	Deputy Chief Janee Harteau:
20	A Not that I recall, sir, no.	20	"Well, I did. I asked on page 39, 'Well, was
21	Q How about the depo testimony of Sergeant	21	David Smith a subject who was not adequately controlled
22	Jason Case?	22	by handcuffing?"
23	That's the Jason.	23	"Answer: No. I would say that once we had
24	A Not that I recall, sir.	24	him handcuffed, we had him --
25	Erick Fors, I cite some of the interviews,	25	"Adequately controlled?"
	75		77
1	but not --	1	I think so. So if --
2	Q Correct.	2	"Okay."
3	A -- his depo.	3	-- someone is adequately controlled do they
4	Q Not his dep, not his testimony.	4	need to be knelt on in a prone restraint position?
5	A I don't believe so, no, sir.	5	"Probably not.")
6	Q How about Dr. Baker's death hierarchy or	6	(End of video clip.)
7	testimony, either one?	7	BY MR. BENNETT:
8	A I don't believe so, no, sir.	8	Q Is that consistent with generally accepted --
9	Q Do you agree with Dr. Baker's death	9	that's Chief Janee Harteau, by the way -- with
10	hierarchy?	10	generally accepted practices and procedures of properly
11	MR. OSBORNE: Objection; lack of foundation.	11	trained and prudent law enforcement officers facing
12	A I'm not a medical expert.	12	similar circumstances?
13	BY MR. BENNETT:	13	A Again, we're back to what's he doing, is he
14	Q You have no reason to disagree with it?	14	merely controlling him with his knee or is he kneeling
15	A I have no -- I read it. I don't -- I don't	15	on him.
16	have a strong feeling about it.	16	Q Well, just so we're clear, you read
17	Q Okay.	17	Dr. Baker's --
18	A I'm not a medical expert.	18	A Yes, sir, I did.
19	Q Okay.	19	Q Dr. Baker said he committed a homicide by
20	It -- nevertheless, it -- how David Smith	20	kneeling on him, didn't he?
21	died, according to the Hennepin County medical	21	A I don't recall that specifically, no, sir.
22	examiner, chief medical examiner, is not in your report	22	Q He -- he was the agent of the mechanic -- his
23	either, is it?	23	knee was the agent of the mechanical asphyxia. He said
24	A No, sir.	24	that, didn't he?
25	THE WITNESS: May I trouble you for a bottle	25	A I don't recall that, sir.

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	78		80
1       Q   Okay.		1 <b>I don't recall specifically his words, no, sir.</b>	
2       You don't recall him saying that the pressure		2    Q   And these other things may or may not have	
3       of the knee on his -- between his scapulas caused the		3       anything to do with the death itself, correct?	
4       mechanical asphyxia?		4 <b>A   Well, it says "other significant conditions."</b>	
5 <b>A   I don't recall that specific language, no,</b>		5    Q   Well, I know. But let's say you were -- you	
6 <b>sir, I do not.</b>		6       fell into the orca tank at Sea World and you were a	
7       Q   What do you think was the cause of the		7       woman. Now, the orca bit you in half, okay? But if	
8       mechanical asphyxia?		8       you get stage four breast cancer, they'd list that in	
9 <b>A   I think there are a variety of factors in --</b>		9       "other significant conditions." Do you understand	
10 <b>in play in the death of David Smith.</b>		10      that?	
11      Q   Okay.		11 <b>A   I don't know that to be the practice. But...</b>	
12 <b>A   And I believe that's what the medical</b>		12      Q   All right.	
13 <b>examiner said.</b>		13      (Reporter's Note: Sotto voce communication	
14      Q   Well, no. He said -- he -- he died of anoxic		14      between Mr. Bennett and Mr. Storms.)	
15      encephalopathy caused by cardiopulmonary arrest,		15      MR. BENNETT: Let's go off the record for a	
16      resuscitated, caused by mechanical asphyxia. Isn't		16      second.	
17      that right? That's what Exhibit 5 says. Or excuse me,		17      VIDEOGRAPHER: Off the video record at	
18      Exhibit 4.		18      10:38 a.m.	
19      The actual due to or as a cause of is, in		19      (Off the record.)	
20      reverse hierarchical order, anoxic encephalopathy,		20      VIDEOGRAPHER: We are back on the video	
21      cardiopulmonary arrest, resuscitated, due to or as a		21      record at 10:41 a.m.	
22      consequence of mechanical asphyxia. Correct?		22      BY MR. BENNETT:	
23 <b>A   I don't see the statement about reverse</b>		23      Q   The following questions and answers were	
24 <b>hierarchy of order. I see a cause of death hierarchy</b>		24      given by Dr. Baker.	
25 <b>report, and then...</b>		25      He was asked, "How was the mechanical force	
	79		81
1       Q   Well, the testimony was it's a reverse		1       that caused the asphyxia of David Smith supplied?	
2       hierarchy. Do you remember that?		2       "Answer: From the videotapes I was able to	
3 <b>A   Sir, I'm responding to your question. And</b>		3       review, it appeared to be the weight of one of the	
4 <b>you used the word "reverse hierarchy" and you're</b>		4       officers on Mr. Smith's back.	
5 <b>pointing at a report. It's not there.</b>		5       "Just one or both?	
6       Q   Okay.		6       "I could only tell one from the videotape,	
7 <b>A   It says, "Cause of Death Hierarchy Report."</b>		7       that I could see.	
8 <b>So my -- I absolutely see what you're --</b>		8       "And that would be the one who had his knee	
9       Q   Do you understand --		9       and -- one or both knees at varying points in time --	
10 <b>A   These specific words.</b>		10      "Yes.	
11      Q   You understand what a reverse hierarchy is?		11      "-- in the middle of his back between his	
12 <b>A   Reverse, you'd flip these.</b>		12      scapulas?	
13      Q   No. You know what anoxic encephalopathy is?		13      "Yes."	
14 <b>A   No, sir.</b>		14      The...	
15      Q   Brain death. That's caused by -- it says		15      Did you read Dr. Baker's deposition?	
16      "due to or as a consequence of (b): Cardiopulmonary		16 <b>A   Yes, sir, I did.</b>	
17      arrest." It's your heart and your lungs stop working.		17      Q   So you would have read that?	
18      Do you know what that -- do you understand that?		18 <b>A   At some point in time, yes, sir.</b>	
19 <b>A   Yes, sir.</b>		19      Q   Did you also read the fact that, "If, once he	
20      Q   "Due to or as a consequence of (c):		20      had been handcuffed, had the officers not remained on	
21      Mechanical asphyxia." Do you see that?		21      top of the subject, and the subject had been turned on	
22 <b>A   Yes, sir.</b>		22      his side or in an upright position of comfort, he would	
23      Q   You don't know what Dr. Baker said was the		23      not have died of mechanical asphyxia?	
24      cause of the mechanical asphyxia?		24      "Answer: No, he would not have died of	
25 <b>A   I recall reading the report, but I -- I mean,</b>		25      mechanical asphyxia."	

21 (Pages 78 to 81)

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<p>1        Do you remember that question and that 2 answer?</p> <p>3        A No, sir, I don't recall that.</p> <p>4        Q Okay. Thank you.</p> <p>5        MR. BENNETT: Give me volume two as well.</p> <p>6        A Sorry, and your question to me now, sir? 7 Because it's -- there's quite a bit of back-and-forth 8 about that issue.</p> <p>9 BY MR. BENNETT:</p> <p>10      Q Well, no, there isn't. 11      I read the question correctly, didn't I?</p> <p>12      A May I have -- may I have the statement, sir?</p> <p>13      Q Yes.</p> <p>14      A Because it starts, you ask the question, "Let 15 me ask..." If you want me to read the one sentence 16 that you're pointing to --</p> <p>17      Q Yeah.</p> <p>18      A -- then I can say yes, that's what the 19 transcript says.</p> <p>20      Q Okay.</p> <p>21      A But just prior to that you said, "Let me ask 22 you. If once David Smith had been handcuffed, had he 23 been turned on his side or in an upright position, 24 would he have died?</p> <p>25      "Answer: He might have."</p>		<p>1        on -- from Coricidin overdose; isn't that correct?</p> <p>2        A I recall a lot of discussion about those 3 various drugs. I don't recall the exact details.</p> <p>4        Q And then discussing his high level of 5 dextromethorphan, he says -- I asked him, "You can't 6 tell me that it contributed at all to his death, can 7 you, to a reasonable degree of medical certainty?" 8 Answer: "No."</p> <p>9        Do you see that?</p> <p>10      A I see those specific lines that you're 11 pointing out to me in the deposition, yes, sir.</p> <p>12      Q All right.</p> <p>13      Now, you wanted to make sure I put everything 14 in with Dr. Baker, right? You wanted me to -- you 15 wanted to add things from that. You didn't put in the 16 compliance, resistance, or -- or giving up in your 17 report about David Smith, correct, Exhibit 1?</p> <p>18      A No, that's not correct.</p> <p>19      Q Where is -- where do the words that he 20 complied, was not resisting, was giving up, in your 21 report? Point them out to me.</p> <p>22      A You didn't ask me if I used those specific 23 words. If I -- I don't know if I used those specific 24 words.</p> <p>25      Q I do.</p>	
<p>1        MR. BENNETT: Okay. 2        I'll ask that it be stricken. It's not 3 responsive.</p> <p>4        MR. OSBORNE: You don't actually strike 5 things from the record, do you? Okay.</p> <p>6        MR. BENNETT: No, not -- she doesn't.</p> <p>7 BY MR. BENNETT:</p> <p>8        Q And just to be clear, he says, "I don't want 9 to endorse that he would have died of some other 10 unknown cause. He has another lethal condition going 11 on that he could have died for -- from." Do you see 12 that?</p> <p>13      A Yes, sir, I do.</p> <p>14      Q And then he goes on to answer that, that he 15 could not tell us to a reasonable degree of medical 16 certainty whether or not he would have expired in 2010 17 from dextromethorphan or chlorpheniramine intoxication 18 at all, correct? Correct.</p> <p>19      You read that, too, didn't you?</p> <p>20      A At some point in time I read his entire 21 deposition, yes, sir.</p> <p>22      Q In fact, he's never had anybody that he knows 23 of die of -- he's never encountered anybody in his 24 career who's died of dextromethorphan or 25 chlorpheniramine intoxication, nor anyone who's died</p>	83		85
		<p>1        A But I certainly --</p> <p>2        Q You didn't.</p> <p>3        MR. OSBORNE: Let him -- let him finish.</p> <p>4 BY MR. BENNETT:</p> <p>5        Q Do you want to look? Go ahead and look.</p> <p>6        A I'm sorry, is there a question there, sir?</p> <p>7        Q Did you use those specific words?</p> <p>8        A Um...</p> <p>9        Q Did you say --</p> <p>10      A Give me the specific words.</p> <p>11      Q Did you ever say that Officer Callahan 12 believed he was complying and giving up, David Smith?</p> <p>13      A Those specific words?</p> <p>14      Q Yeah.</p> <p>15      A No, sir.</p> <p>16      Q Okay.</p> <p>17      So you understand that Dr. Baker felt that 18 the agent of the mechanical asphyxia was one knee or 19 both knees of -- of Officer Gorman, correct?</p> <p>20      A I understand that we read a line or two from 21 his deposition that said that, yes, sir.</p> <p>22      Q You read his whole deposition.</p> <p>23      A And I don't recall his entire deposition as I 24 sit here, sir.</p> <p>25      Q Isn't that what he said? Wasn't that his</p>	

22 (Pages 82 to 85)

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<p>86</p> <p>1 conclusion to a reasonable degree of medical certainty?</p> <p>2     <b>A I don't recall that, sir.</b></p> <p>3     Q I'll read you the following question and</p> <p>4 answer. This is to Dr. Baker, volume two of his</p> <p>5 deposition.</p> <p>6     "And if both officers testified that Officer</p> <p>7 Gorman, that is the officer with the knee or knees</p> <p>8 placed between the scapulae of David Cornelius Smith,</p> <p>9 kept that position with one or both knees for a period</p> <p>10 of four and one half minutes, that would be consistent</p> <p>11 with your view of the video evidence?"</p> <p>12     "Answer: Yes.</p> <p>13     "And that is the particular evidence of the</p> <p>14 mechanical asphyxia that you rely on to come to your</p> <p>15 judgment to a reasonable degree of medical certainty?"</p> <p>16     "Answer: Yes."</p> <p>17     Do you understand that to be his conclusion?</p> <p>18     <b>A I understand what you just read me, yes, sir.</b></p> <p>19     Q Okay.</p> <p>20     Now, you read the depositions of -- of Amelia</p> <p>21 Huffman and Lieutenant Zimmerman as well, right?</p> <p>22     <b>A I believe so, yes, sir.</b></p> <p>23     Q Let me ask you this. Let's just take you</p> <p>24 through this. Let's talk about the duty to monitor a</p> <p>25 subject's medical condition.</p>	<p>88</p> <p>1 obligations under the Fourth Amendment, correct?</p> <p>2     "Correct.</p> <p>3     "Okay.")</p> <p>4 (End of video clip.)</p> <p>5 BY MR. BENNETT:</p> <p>6     Q Is that statement by Sergeant Anderson</p> <p>7 consistent with generally accepted practices and</p> <p>8 procedures of properly trained and prudent law</p> <p>9 enforcement officers?</p> <p>10     <b>A Which statement? There was like four</b></p> <p>11 <b>questions.</b></p> <p>12     Q Was there anything that wasn't consistent in</p> <p>13 those statements?</p> <p>14     <b>A I don't believe so, no.</b></p> <p>15     Q Okay.</p> <p>16 (Video clip shown of the following questions</p> <p>17 and answers from the October 2, 2012 testimony of</p> <p>18 Sergeant Brian Anderson:</p> <p>19     "And it's a little... in some sense it's</p> <p>20 superfluous or redundant, I guess, that you need to</p> <p>21 monitor the medical condition of someone post-Tasing</p> <p>22 because the policy was already requiring officers to</p> <p>23 monitor the medical condition of a subject after any</p> <p>24 force?"</p> <p>25     "Correct.</p>
<p>87</p> <p>1     This is Sergeant Brian Anderson.</p> <p>2 (Video clip shown of the following questions</p> <p>3 and answers from the October 2, 2012 testimony of</p> <p>4 Sergeant Brian Anderson:</p> <p>5     "And aside from just the Tasing, I guess we</p> <p>6 can back up to section 5-306. Now, here it states</p> <p>7 that, 'Any sworn MPD employee that uses force shall</p> <p>8 comply with the following requirements.' And the first</p> <p>9 it lists is medical assistance, and states, 'As soon as</p> <p>10 reasonably practical, determine if anyone was injured</p> <p>11 and render medical aid consistent with training and</p> <p>12 request emergency medical service if necessary,</p> <p>13 correct?"</p> <p>14     "Correct.</p> <p>15     "So this policy works similar to the TASER</p> <p>16 policy we discussed, in that after you use some level</p> <p>17 of force, the first thing you want to do as soon as</p> <p>18 it's reasonably practical is monitor the medical</p> <p>19 condition of the subject you used force on?"</p> <p>20     "Correct.</p> <p>21     "Okay. And that's been standard training</p> <p>22 since well before September 2010?"</p> <p>23     "Correct.</p> <p>24     "The need to monitor the medical condition,</p> <p>25 as set forth in this policy, reflects the officer's</p>	<p>89</p> <p>1     "Okay. And in terms of monitoring the</p> <p>2 medical condition of a subject, and I think we touched</p> <p>3 on it briefly, things that officers were trained prior</p> <p>4 to 2010 to observe would be is the subject breathing?"</p> <p>5     "Correct.</p> <p>6     "Are they conscious?"</p> <p>7     "Correct."</p> <p>8     "Do they have any other life-threatening</p> <p>9 injuries?"</p> <p>10     "Correct."</p> <p>11 (End of video clip.)</p> <p>12 BY MR. BENNETT:</p> <p>13     Q All of that is consistent with generally</p> <p>14 accepted practices and procedures of properly trained</p> <p>15 and prudent law enforcement officers, correct?</p> <p>16     <b>A Yes. In general I would agree with all of</b></p> <p>17 <b>that, sir.</b></p> <p>18     Q Okay.</p> <p>19 (Video clip shown of the following questions</p> <p>20 and answers from the October 2, 2012 testimony of</p> <p>21 Sergeant Brian Anderson:</p> <p>22     "It goes on to say, 'Once a subject is</p> <p>23 secured, an officer shall watch for any of the</p> <p>24 following signs: Significant change in behavior or</p> <p>25 level of consciousness, shortness of breath or</p>

23 (Pages 86 to 89)

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1	irregular breathing, seizures or convulsions,	1	and lay hands on from the time you do so until the time
2	complaints of serious pain or injury, and/or any other	2	you turn them over to either the jail or the medical
3	serious medical problem.' Do you see that?	3	personnel, correct?
4	"Yes.	4	"Correct.
5	"Now, this -- at a certain level, this	5	"You have been taught in your training that
6	mirrors the use-of-force policy itself which says you	6	if a person -- that -- well, there are a number of
7	need to monitor the medical condition of the subject?	7	situations you've been taught or trained to turn an
8	"Correct.")	8	arrestee on their side or to set them up -- sit them
9	(End of video clip.)	9	up, correct?
10	BY MR. BENNETT:	10	"Correct.
11	Q And is that all consistent with generally	11	"One of them, oddly enough, is the excited
12	accepted practices and procedures of properly trained	12	delirium situation. You actually have training on
13	and prudent law enforcement officers?	13	that, right?
14	A Well, he's reading from a document, and I	14	"Correct.
15	don't know what the document is.	15	"And you're trained that if there's any --
16	Q Well, does it or does it not?	16	you're supposed to pay attention if there's any of
17	A I can't answer the question, because he's	17	those myriad of things that you list for potential
18	reading from a specific document and the questions were	18	excited delirium; that you're to watch the breathing
19	about that document and I don't know what that document	19	and if there's any compromise at all, you turn them on
20	is.	20	their side or sit them up so that you get them
21	Q All right.	21	breathing, correct?
22	A He's being asked questions about a specific	22	"That sounds accurate.
23	document that --	23	"That's also true with regard to really any
24	Q Well, did they -- did the principles appear	24	time that you have a person restrained in a prone
25	to be consistent with generally accepted practices and	25	restraint and you notice any compromise of breathing.
	91		93
1	procedures of a properly trained and prudent law	1	That's what you're supposed to do? That's the
2	enforcement --	2	response?
3	A The principles that we discussed earlier	3	"I -- I would agree with you.
4	about medically monitoring someone --	4	"The other thing is you're supposed to pay
5	Q Yes.	5	attention to the person you're continuing to use force
6	A -- to make sure that they were --	6	on to determine if they're losing consciousness or
7	Do you want me to answer or not, sir?	7	having trouble breathing?
8	Q Yeah, go ahead.	8	"Correct.
9	A Whether or not they're breathing -- breathing	9	"So you can't really -- you know, you don't
10	or bleeding, absolutely, yes, sir.	10	want to talk about the weather. You don't want to, you
11	Q I'm going to show you, this is Detective	11	know, try to figure your golf score in reverse order
12	Fors.	12	from the holes you played. You don't want to -- you
13	(Video clip shown of the following questions	13	want to pay attention to the -- to the very serious
14	and answers from the May 10, 2012 testimony of	14	business of -- of using force on people, which is
15	Detective Erick Fors:	15	something that we license police officers to do,
16	"Somebody you take -- you lay hands on and	16	correct?
17	you use force on them, you have to monitor their	17	"Yes, you should be aware."
18	consciousness, correct?	18	(End of video clip.)
19	"Correct.	19	BY MR. BENNETT:
20	You have to monitor their -- their	20	Q Anything about Detective Fors' testimony that
21	breathing; in other words, they can't -- you don't want	21	you disagree with?
22	them to stop breathing or have a compromise in their	22	A Well, you played me a fairly long snippet
23	breathing, do you?	23	there. There's a number of places where if you had
24	"Correct.	24	stopped it, I would say absolutely there are some
25	"You're responsible for the people you seize	25	things that -- the excited delirium and the discussion

24 (Pages 90 to 93)

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<p style="text-align: right;">94</p> <p>1 about moving someone is a little more problematic. But 2 absolutely in terms of the broad, general concepts of 3 monitoring someone, making sure that they are 4 breathing, being responsible for the people that you 5 have in custody, yes.</p> <p>6 Q You read Adam Grobove -- he's actually a 7 trainer who trained Callahan and Gorman. Do you 8 remember reading that?</p> <p>9 A Vaguely, yes, sir.</p> <p>10 MR. BENNETT: This is Grobove: (Video clip shown of the following questions 12 and answers from the August 13, 2012 testimony of 13 Officer Adam Grobove: 14 "And they'd be trained that once you have a 15 subject secured, an officer shall watch for any of the 16 following signs, including significant change in 17 behavior or level of consciousness? 18 "Yes, those are behaviors. 19 "Shortness of breath, irregular breathing or 20 not breathing? 21 "Yes. 22 "Seizures, convulsions? 23 "Yes. 24 "Complaints of any other serious pain or 25 injury and any other serious medical problem, right?</p>	<p style="text-align: right;">96</p> <p>1 Fourth Amendment to, for example, continue -- to 2 continue monitoring the breathing of a suspect that 3 they've arrested? 4 "Yes. 5 "That didn't happen in this case? 6 "No. There was a significant gap of time in 7 which that did not happen." 8 (End of video clip.) 9 BY MR. BENNETT: 10 Q Do you disagree with anything that Captain 11 Huffman said? 12 A About the -- except for the last sentence, I 13 agree with everything she said. I don't agree with her 14 last sentence. 15 Q And why not? 16 A Because I believe that they were talking to 17 him, engaged with him while they were with him. They 18 may not have been perfectly attentive to him, but they 19 were attendant (sic) to him to some degree. 20 Q Well, they never got any response from him. 21 A They never got a response from him the entire 22 time they interacted with him, yes, sir, that's 23 correct. 24 Q After the agonal breathing, could you hear 25 any sounds from him?</p>
<p style="text-align: right;">95</p> <p>1 "Yes. 2 "I mean, you're basically -- 3 "It's medical monitoring. 4 -- supposed to medically monitor the person 5 you're arresting? 6 "Yes." 7 (End of video clip.) 8 BY MR. BENNETT: 9 Q And the trainer who trained Gorman and 10 Callahan used the term "medically monitoring," didn't 11 he? 12 A He did. 13 Q And this is Captain Huffman. This gets -- 14 (Video clip shown of the following questions 15 and answers from the July 31, 2012 testimony of Captain 16 Amelia Huffman: 17 "And similarly, officers have an obligation 18 under the Fourth Amendment when they -- when they 19 arrest someone or otherwise maintain someone in 20 custody, they have an obligation to ensure that that 21 person remains in good health? 22 "Yes. 23 "Continues to breathe? 24 "Yes. 25 "And so officers have an obligation under the</p>	<p style="text-align: right;">97</p> <p>1 A I'm not familiar with the term "agonal 2 breathing," except when you've used it in this case, 3 sir. 4 Q Well, after the second moaning or groaning, 5 whatever, the -- what -- what Dr. Baker called agonal 6 breathing or sonorous breathing. Do you know what I'm 7 talking about, on the tape? 8 A I understand when you say "groaning," yes. 9 Q Did you hear any sounds from him after that 10 time? 11 A I don't believe so, no, sir. 12 Q And that was at the -- at the 2:45 minute 13 mark after the start of the first TASER cycle. 14 A Well, which clock are you using? Because 15 there's multiple clocks -- 16 Q Well, I'm using Dr. Baker's PowerPoint. He 17 starts at the end -- at the first TASER cycle. He's 18 handcuffed at -- at, according to Dr. Baker -- the last 19 TASER cycle ends at 50 seconds. By 54 seconds he's 20 handcuffed. Baker says his last voluntary sound is at 21 a minute 46. Do you see that? 22 A I -- I -- you've got it upside down there. 23 Q I'm sorry. 24 A That's all right. 25 Q Don't mind me. I'm not trying to --</p>

25 (Pages 94 to 97)

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<p>98</p> <p>1 A I didn't think you were, sir.      2 Q -- intimidate you or do anything to -- not      3 that I could, but the...      4 And he says the sonorous breathing or what he      5 says agonal breathing, or the death rattle, for      6 laypeople, starts at 2:14 and ends at 2:45. Do you see      7 that?</p> <p>8 A If you're talking about the groaning, yes,      9 sir.      10 Q I'm -- he has the knee still on the back at      11 4:48, for another two minutes after the sonorous      12 breathing ends, correct?      13 A Yes, sir.      14 Q And he doesn't have the CPR started for      15 almost four minutes after that, correct?      16 A Yes, sir. Yes, sir.      17 Q Do you have any disagreement with those      18 times?      19 A No, sir.      20 Q Okay.      21 Did they ever get a response from David Smith      22 in all their discussion with him?      23 A A verbal response? No, sir.      24 Q Well, did they get any response?      25 A Well, there's different sounds that he makes</p>	<p>100</p> <p>1 took a shot at it. And -- like, for example, I think      2 one that -- for instance, Gorman testified in the      3 second deposition after hearing this, he said, "Never      4 get the drugs out on time." The word "drugs" is not      5 correct. It was "never get the gloves out on time."      6 A Yes, sir.      7 Q Do you remember reading that?      8 A Yes, sir.      9 Q Okay.      10 A I remember some conversation somewhere about      11 that, yes, sir.      12 Q But it was -- it was, you know, they      13 oftentimes put gloves on if they're going to -- they      14 know they're going to deal with people, and you see      15 them -- did you watch all the pen camera videos?      16 A I've watched pen camera videos. Whether      17 they're all of them, I don't know, sir.      18 Q Did you watch -- did you get a video -- did      19 you get a disk with a number of pen camera videos on      20 it?      21 A That I don't recall.      22 MR. OSBORNE: I don't think I sent those to      23 Michael.      24 BY MR. BENNETT:      25 Q Okay. So you haven't seen the other</p>
<p>99</p> <p>1 and there's different movements that he makes at      2 different times.      3 Q Is there any movement after sonorous      4 breathing ends?      5 A I really don't recall when the movements stop      6 and start. It's a little difficult to determine.      7 Q The last -- you understand what Exhibit 30      8 is? Do you know what that is?      9 A I believe this is a little matrix that was      10 put together, yes, sir.      11 Q It says, "Timeline of Events. Pen Camera      12 Video"?</p> <p>13 A Yes, sir.      14 Q It has the MPD case control number on it?      15 A Where is that?      16 Oh, yes. Yes, sir.      17 Q I mean, just to reference it to this case.      18 A Yeah. No, I understand. I just didn't -- I      19 didn't see it.      20 Q Do you know who did this?      21 A I think it was done by an Internal Affairs --      22 is it -- might be Sergeant Case.      23 Q Correct.      24 A Is that right?      25 Q And he didn't get all the words right, but he</p>	<p>101</p> <p>1 instances in which the pen camera was used?      2 A I've read deposition testimony about it.      3 Q Okay.      4 A But I've not -- I don't believe I've seen      5 those videos, no, sir.      6 Q Okay. Well, you -- you can imagine that they      7 go to a call; if they know they've got to deal with      8 someone hands-on, a lot of times they'll put on gloves.      9 That's not uncommon, correct?      10 A Talking about latex gloves or like black      11 leather or Kevlar?      12 Q Actually, Gorman seems to put on latex and --      13 and Callahan seems to put on leather gloves, if I      14 remember right.      15 MR. OSBORNE: Yeah, but I think that's --      16 A There are certainly issues about putting on      17 gloves and what departments allow, and...      18 A number of departments are -- don't approve      19 of the black leather gloves.      20 BY MR. BENNETT:      21 Q Okay. The...      22 But there's a lot of discussion in this      23 period, including the period when the groaning starts      24 and the groaning stops, right? You know, "Never get      25 the gloves out on time. I can't believe he punched me</p>

26 (Pages 98 to 101)

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<p>102</p> <p>1 in the face. I got that all on here," and he taps the 2 video. Do you remember seeing that?</p> <p>3 A Yes, sir, I do.</p> <p>4 Q "Can we charge him with assault 4?" And then 5 they say, "Dave, what are you doing? What are you on? 6 Dave? Dave? Come on, man. Or what are you on, 7 man? Dave?"</p> <p>8 And there's -- you know, so there's 9 discussion. They never get any response to any 10 questions, right?</p> <p>11 A No, sir, they do not.</p> <p>12 Q So if you don't get a response, shouldn't you 13 be worried? If you ask questions, you get nothing?</p> <p>14 A Well, they -- they never got an answer from 15 him the whole time they asked him questions.</p> <p>16 Q Well, it doesn't mean you can -- if you don't 17 get an answer, it doesn't mean you can stop medically 18 monitoring, does it?</p> <p>19 A You -- they're still engaged with him, 20 they're still with him, they're still looking at him.</p> <p>21 Q Well, they didn't notice him die, did they?</p> <p>22 And that's really what happened.</p> <p>23 A They did not notice that there came a point 24 in time when he stopped breathing, immediately. They 25 did notice it and then they immediately started CPR.</p>	<p>104</p> <p>1 Right?</p> <p>2 A Yes, sir.</p> <p>3 Q And they don't start chest compressions 4 until -- from -- for 45 seconds after he says, "Gorman. 5 Gorman. Dude. I don't think he's breathing."</p> <p>6 A Yes, sir, that's correct.</p> <p>7 Q Okay.</p> <p>8 When you're not breathing, 45 seconds is not 9 immediately, is it?</p> <p>10 A I don't know how to answer that. I mean, if 11 you're not breathing, you want someone to assist you 12 immediately.</p> <p>13 Q Yeah. Because you got how many minutes 14 before you go brain dead, before you have brain damage?</p> <p>15 About four?</p> <p>16 A I knew that once upon a time. I'm not sure 17 I've studied that in a long time.</p> <p>18 Q I'm going to talk to you about -- this is the 19 head of detectives.</p> <p>20 (Video clip shown of the following questions 21 and answers from the July 31, 2012 testimony of 22 Lieutenant Richard Zimmerman:</p> <p>23 "As a homicide investigator and then, you 24 know, obviously now as a lieutenant, do you have the 25 ability to point out any policy violations that you</p>
<p>103</p> <p>1 But there was a period --</p> <p>2 Q Well, they didn't even do that. That isn't 3 fair, is it? They took his pulse. How much time 4 elapsed between the -- he says Gorman -- Gorman goes...</p> <p>5 "Gorman. Gorman. I don't think he's 6 breathing." That's at eight -- at the 8-minute mark, 7 according to Exhibit 30.</p> <p>8 A Yes, sir.</p> <p>9 Q And they don't start CPR --</p> <p>10 A Well, they're doing other things here, aren't 11 they? I -- he's checking his pulse at that point in 12 time.</p> <p>13 Q But he waits 44 seconds. I mean --</p> <p>14 A He waits 44 seconds for what? He's checking 15 his pulse in that time.</p> <p>16 Q He already had no pulse.</p> <p>17 A Well --</p> <p>18 Q Here's where the no pulse is.</p> <p>19 He -- you -- where he checks his pulse, you 20 can see that. You can't -- he didn't check the pulse 21 once he turns him over.</p> <p>22 A I believe it says right here, "I ain't got no 23 pulse."</p> <p>24 Q Okay. And that's at 8:27 he's having this 25 discussion. And that's where Gorman goes, "Hmmm."</p>	<p>105</p> <p>1 observe to someone in Internal Affairs?</p> <p>2 "Yes. I have a duty to report policy 3 violations. Yeah.</p> <p>4 "Okay. And is that something you've done 5 before?</p> <p>6 "Yes.</p> <p>7 "Okay. Did you observe any policy violations 8 in this case?</p> <p>9 "Um... I may have, yes.</p> <p>10 "And what policy violations do you believe 11 you may have observed in this case?</p> <p>12 "The duty to render -- you know, to render 13 aid right away.</p> <p>14 "Did you express concern about that to 15 anyone?</p> <p>16 "No.</p> <p>17 "And if you have a duty to do so, why is it 18 that you didn't express concern about that to anyone?</p> <p>19 "Because IA was down there, too, and 20 investigated alongside of Homicide.</p> <p>21 "And so are you saying that you believe that 22 any policy violation is something that should have been 23 observed by them?</p> <p>24 "Yes.</p> <p>25 "Okay. And it was a policy violation that</p>

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<p>1 was obvious to you?      2 "Yeah.")      3 (End of video clip.)      4 BY MR. BENNETT:      5 Q Do you disagree with Lieutenant Zimmerman?      6 A Yes, sir.      7 Q Okay.      8 Lieutenant Zimmerman took some time before he      9 answered those questions, too, didn't he?      10 A Yes, sir, he did, at least the one. One      11 question he did.      12 Q There are specific training about -- that MPD      13 gives to monitor the handcuffed subjects in the prone      14 position; isn't that true?      15 A I don't recall. It might have been in the      16 training material.      17 Q Well, here's the training officer.      18 (Video clip shown of the following questions      19 and answers from the October 2, 2012 testimony of      20 Sergeant Brian Anderson:      21 "If MPD officers were maintaining someone in      22 a prone position, though, in terms of training prior to      23 2010, they would have been trained that you want to      24 overall pay attention to the medical condition of the      25 subject?</p>	<p>1 BY MR. BENNETT:      2 Q Do you agree with those -- with that?      3 A Yes, sir.      4 Q And then here's --      5 (Video clip shown of the following questions      6 and answers from the May 10, 2012 testimony of      7 Detective Erick Fors:      8 "You believe, if, as Gorman admits, he was      9 on -- applying pressure with one or both knees or      10 alternatively applying pressure with the left or right      11 knee for a period of four and a half minutes, you would      12 expect him to pay attention for those four and a half      13 minutes, don't you?      14 "Yes.      15 "And the attention is to be directed on the      16 person you're using the force on?      17 "Correct.      18 "And the reason you do that is that you don't      19 want someone to die by mistake while you're holding      20 onto them, do you?      21 "I think you could encompass it into a wider      22 range: If you don't want the person to suffer any      23 medical problems.      24 "That's right."      25 MR. BENNETT: And --</p>	
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<p>1 "Correct.      2 "Because you would want to do that after any      3 use of force anyway?      4 "Correct.      5 "And handcuffing someone and putting them in      6 a prone position is obviously a use of force?      7 "Correct.      8 "Okay.")      9 (End of video clip.)      10 BY MR. BENNETT:      11 Q Do you agree with those statements?      12 A Yes, sir.      13 (Video clip shown of the following questions      14 and answers from the October 2, 2012 testimony of      15 Sergeant Brian Anderson:      16 "You would basically expect any officer      17 working at the MPD in September of 2010, who had been      18 there for any period of time, would have been trained      19 that if they're holding someone in a prone restraint      20 position, as soon as it's practical, they should be      21 paying attention to whether or not that individual is      22 suffering from any medical conditions?      23 "Correct.")      24 (End of video clip.)</p>	<p>1 (Video clip continues:      2 "...Minneapolis Police Department, that      3 prolonged kneeling on a subject's back during a      4 use-of-force encounter can compromise breathing,      5 correct?      6 "Correct.")      7 (End of video clip.)      8 BY MR. BENNETT:      9 Q Do you agree with Detective Fors?      10 A I don't know who he is. And I think we've      11 already looked at this, sir.      12 Q Not that one.      13 A Okay. You show me little clips of videos,      14 sir. It's difficult -- and you show them in a random,      15 rapid order without telling me who is speaking first.      16 So it's a little difficult me to keep them all      17 straight.      18 Q That was Detective Fors, who -- the guy who      19 took --      20 A The statements.      21 Q -- the statements.      22 A Okay. Great.      23 I can agree with what he said up until the      24 last question and answer.      25 Q Okay.</p>	

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<p>1        And what do you disagree with about the last 2 question and answer?</p> <p>3        A Oh, well, now you -- I'd have to -- you'd 4 have to show me that last question and answer again.</p> <p>5        Q Okay.</p> <p>6        MR. BENNETT: Can I move this forward to 7 the -- no?</p> <p>8        (Video clip shown of the following questions 9 and answers from the May 10, 2012 testimony of 10 Detective Erick Fors: 11        "You believe, if, as Gorman admits, he was 12 on -- applying pressure with one or both knees or 13 alternatively applying pressure with the left or right 14 knee for a period of four and a half minutes, you would 15 expect him to pay attention for those four and a half 16 minutes, don't you? 17        "Yes. 18        "And the attention is to be directed on the 19 person you're using the force on? 20        "Correct. 21        "And the reason you do that is that you don't 22 want someone to die by mistake while you're holding 23 onto them, do you? 24        "I think you could encompass it into a wider 25 range: If you don't want the person to suffer any</p>	<p>110</p> <p>1        A <b>What training?</b> 2        Q That he just said he received. 3        A I'm not aware of what training he received, 4 sir. I don't recall what training he received. 5        Q The training that kneeling on the subject's 6 back in the prone position for four and a half minutes 7 is improper. 8        A You're saying that he received specific 9 training that -- 10       Q He said. I didn't say. I'm just saying -- 11 you say -- are you saying he didn't get the training he 12 just said? 13       A No, I'm not -- I have no opinion whether or 14 not he got the training. 15       Q Is the training that he described consistent 16 with generally accepted practices and procedures of a 17 properly trained and prudent law enforcement agency? 18       A I have no idea. I'd have to see the 19 training. 20       Q Okay. 21       And here's the training officer. 22       (Video clip shown of the following questions 23 and answers from the October 2, 2012 testimony of 24 Sergeant Brian Anderson: 25       "Prior to September 9, 2010, were MPD</p>
<p>111</p> <p>1        medical problems. 2        "That's right." 3        (End of video clip.) 4        BY MR. BENNETT: 5        Q And there's the last question. 6        A Right. 7        (Video clip shown of the following questions 8 and answers from the May 10, 2012 testimony of 9 Detective Erick Fors: 10        "... the Minneapolis Police Department, that 11 prolonged kneeling on a subject's back during a 12 use-of-force encounter can compromise breathing, 13 correct? 14        "Correct." 15        (End of video clip.) 16        BY MR. BENNETT: 17        Q Do you disagree with the fact that he's had 18 that training? 19        A I have no idea. I don't recall if he did or 20 he didn't. 21        Q So that isn't -- is that training that he 22 just talked about in the last answer, is that 23 consistent with generally accepted practices and 24 procedures of properly trained and prudent law 25 enforcement agencies?</p>	<p>113</p> <p>1        officers trained that it's appropriate to place a 2 subject in prone position and kneel on the subject's 3 back for several minutes without monitoring the 4 subject's level of consciousness? 5        "No. 6        "Prior to September 9, 2010, were MPD 7 officers trained that it is appropriate to place a 8 subject in the prone position and kneel on the 9 subject's back for several minutes without monitoring 10 the subject's breathing? 11        "No." 12        (End of video clip.) 13        BY MR. BENNETT: 14        Q Do you agree with -- with training Officer 15 Brian Anderson? 16        A Well, again, he's referencing training, and 17 I'm not sure what you're referring to. And if you'll 18 recall from the video before that, you were very 19 careful, Mr. Bennett, to talk about alternately placing 20 pressure of one knee and then the other, versus here 21 where it's just referred to as "kneeling." So I have 22 difficulty just giving you a yes or no answer as to do 23 I agree with the sergeant. 24        Q So you don't -- you're not able to answer the 25 question?</p>

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<p>114</p> <p>1 A No, sir. There's a significant difference in 2 the way the questions were phrased. 3 Q Okay. This is Sergeant Anderson again. 4 (Video clip shown of the following questions 5 and answers from the October 2, 2012 testimony of 6 Sergeant Brian Anderson: 7 "So if you had a suspect who was complying 8 and was under control, the training that you provided 9 would have been at that point you want to get that 10 person in a side position or a seated position? 11 "Correct. 12 "Okay. Would you expect that all MP -- all 13 MPD officers prior to 2010 would have received training 14 to that effect? 15 "Correct. 16 "Okay." 17 (End of video clip.) 18 BY MR. BENNETT: 19 Q Is that training consistent with generally 20 accepted practices and procedures of a properly trained 21 and prudent law enforcement agency? 22 A I don't know what training he's referencing, 23 sir. I'm not -- 24 Q The training he just described. 25 A He didn't describe training, sir.</p>	<p>116</p> <p>1 person in a side position or a seated position? 2 "Correct. 3 "Okay. Would you expect that all MP -- all 4 MPD officers prior to 2010 would have received training 5 to that effect? 6 "Correct. 7 "Okay." 8 (End of video clip.) 9 BY MR. BENNETT: 10 Q What's wrong with -- what is unanswerable 11 about that question? 12 A Ask me the question, sir. You're asking -- 13 if you're asking me about the training, I'd have to see 14 the plan of training. If you're asking me about -- 15 Q I asked him about the training. He didn't 16 say I needed to show him the plan of training. 17 A I'm not testifying for him, sir. 18 Q Well, he was the -- he was the training 19 expert for the city that they put up as a Rule 20 30(b)(6). You know what that is, don't you? 21 A Yes, I do. 22 Q You're a lawyer. 23 A Yes, sir. 24 Q Okay. That means they designate someone 25 who's most knowledgeable about training, doesn't it?</p>
<p>115</p> <p>1 Q He did -- 2 A The question was -- the question was: Did 3 you provide training. And I -- I don't have the 4 training program, so I'd have to see what the specific 5 training was, sir. 6 Q Well, he -- he's verbally describing the 7 training. Is that the problem, you don't like his 8 verbal description of it? Do you disagree with his 9 verbal description of it? 10 A I don't know, sir. I'd have to see what the 11 specific training -- you're asking him about training 12 that was delivered to Minneapolis PD. You're 13 referencing a course of training. 14 Q Well, he is. 15 A No, sir. The question is -- the questioner 16 is asking him about a course of training. 17 Q Well, what do you disagree with the answer? 18 Is there anything you -- just watch it again, see if 19 you -- you tell me what's wrong with his answer. 20 (Video clip shown of the following questions 21 and answers from the October 2, 2012 testimony of 22 Sergeant Brian Anderson: 23 "So if you had a suspect who was complying 24 and was under control, the training that you provided 25 would have been at that point you want to get that</p>	<p>117</p> <p>1 A They designate a specific individual to speak 2 on training, yes, sir. 3 Q Well, assuming I wrote the Rule 30(b)(6) 4 Notice correctly, it would be the person who's able to 5 give the answers with the most underlying knowledge, 6 correct? 7 A And presume they pick the right person, 8 absolutely. 9 Q Is there anything about his answer you didn't 10 understand? 11 A That I didn't understand? 12 Q Yes. 13 A No. 14 Q Anything you disagreed with? 15 A He's -- his answer relates to a specific 16 course of training that he's familiar with that I'm 17 not. 18 Q Okay. But he's asking about what officers 19 should have understood from the training. Did you get 20 that from the answer? 21 A Yes, sir. 22 Q All right. Do you have any disagreement 23 with -- I mean, is that -- is that what you want 24 officers to get from that kind of training? 25 A I -- I don't know what the training was, sir.</p>

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<p>1 Q Okay. All right.</p> <p>2 (Video clip shown of the following questions</p> <p>3 and answers from the July 31, 2012 testimony of Captain</p> <p>4 Amelia Huffman:</p> <p>5 "Now, you talk about not being a doctor in</p> <p>6 terms of understanding the length of time that, you</p> <p>7 know, there was kneeling on David Smith's back.</p> <p>8 Minneapolis police officers, along with all other</p> <p>9 police officers, have been trained for a long period of</p> <p>10 time that you're not supposed to continue to kneel on</p> <p>11 the backs of subjects for a long period of time; isn't</p> <p>12 that right?</p> <p>13 "Yes. We train officers to turn them over</p> <p>14 into the recovery position as soon as practical.</p> <p>15 "And that was long before this case, wasn't</p> <p>16 it, that that training has been provided?</p> <p>17 "Yes. I don't know for how long and in –</p> <p>18 and in what context, but certainly it's been part of</p> <p>19 our maximal restraint policy for many years.</p> <p>20 "And it's something that you would -- that</p> <p>21 you train to do not only in maximal restraint, but in</p> <p>22 any situation where you have a handcuffed individual in</p> <p>23 the prone position; isn't that right?</p> <p>24 "Yes. We encourage officers to turn them</p> <p>25 over as soon as practical onto their side.")</p>	<p>1 "Your training as a Minneapolis police</p> <p>2 officer tells you that you should turn a</p> <p>3 prone-restrained subject on their side to assist with</p> <p>4 breathing?</p> <p>5 "At a certain point, yes.</p> <p>6 "Well, whenever you can, the first point you</p> <p>7 can?</p> <p>8 "Yes.</p> <p>9 "MPD policy also tells you the same thing?</p> <p>10 "Correct.</p> <p>11 "You believe that there may have been a</p> <p>12 different outcome in this case if David Smith was put</p> <p>13 on his side?</p> <p>14 "There could have been, yes.")</p> <p>15 (End of video clip.)</p> <p>16 BY MR. BENNETT:</p> <p>17 Q Do you have any disagreement with Lieutenant,</p> <p>18 now Deputy Chief, Glampe?</p> <p>19 A Again, I believe it appears to me that the</p> <p>20 questions are very broad and his answers are very</p> <p>21 broad, so I would not agree with them as given.</p> <p>22 Q Okay.</p> <p>23 Here is Detective Zimmerman.</p> <p>24 (Video clip shown of the following questions</p> <p>25 and answers from the July 31, 2012 testimony of</p>
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<p>1 (End of video clip.)</p> <p>2 BY MR. BENNETT:</p> <p>3 Q Do you understand what that training that</p> <p>4 she's describing is?</p> <p>5 A No, sir.</p> <p>6 Q Okay.</p> <p>7 So you're unable to comment on it one way or</p> <p>8 another?</p> <p>9 A No, sir, I wouldn't comment on that.</p> <p>10 Q Okay. Good.</p> <p>11 This is Travis Glampe, the head of IA.</p> <p>12 (Video clip shown of the following questions</p> <p>13 and answers from the July 24, 2012 testimony of</p> <p>14 Lieutenant Travis Glampe:</p> <p>15 "-- restrained in a prone position in the way</p> <p>16 that Callahan and Gorman did" --</p> <p>17 THE WITNESS: Can you restart it? I'm sorry,</p> <p>18 you were talking to me when it started.</p> <p>19 MR. BENNETT: Sure.</p> <p>20 Can I just hit it again, Katie?</p> <p>21 Travis Glampe, IA lieutenant:</p> <p>22 ("You agree that keeping David Smith</p> <p>23 restrained in a prone position in the way that Callahan</p> <p>24 and Gorman did was a use of force?</p> <p>25 "Yes.</p>	<p>1 Lieutenant Richard Zimmerman:</p> <p>2 "Did it surprise you that the cause of death</p> <p>3 was mechanical asphyxia?</p> <p>4 "No.</p> <p>5 "And why didn't that surprise you?</p> <p>6 "Because they had kneeled on him to handcuff</p> <p>7 him.")</p> <p>8 (End of video clip.)</p> <p>9 BY MR. BENNETT:</p> <p>10 Q Now, I didn't use the word "kneel," and</p> <p>11 neither did Mr. Storms. That was the head of -- or the</p> <p>12 lieutenant in Homicide's words. Correct?</p> <p>13 A Yes, sir.</p> <p>14 Q Okay.</p> <p>15 And he certainty understood that kneeling on</p> <p>16 the subject's back could cause them to die from</p> <p>17 mechanical asphyxia, couldn't he? Is that generally</p> <p>18 understood in police -- in police practice?</p> <p>19 A Well, we've seen "kneeling" described four</p> <p>20 different ways, at least, since we've been going</p> <p>21 through these videos. So I don't think I can give you</p> <p>22 a clear answer to that question.</p> <p>23 Q I'm sure you can't.</p> <p>24 A I'm sorry, was that a question, sir?</p> <p>25 Q No, that was a comment.</p>

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1        The -- I want to go through your report, ask 2        you some questions here about that. 3        Basically what was described in the details 4        of the incident was a person who was mentally ill, 5        correct? That they were -- 6        A I don't know what you're referring to, sir. 7        Q Well, I'm referring to page 7 and 8 of your 8        -- 9        "He might have been drunk, but she was unsure 10      if he was drunk, but he was nonresponsive to her 11      questions, confused." Correct? 12      A You're asking what -- I'm repeating what the 13      various witnesses said? 14      Q Well, you repeat parts of what various 15      witnesses said, to be fair. Correct? 16      A I try and lay out the facts using the various 17      witnesses that are fact witnesses. 18      Q Yeah. Okay. 19      And in fact, you cite the 911 call. It said, 20      "We have a gentleman in the building. He doesn't know 21      who he is, he doesn't know his name, he doesn't know my 22      name, and he doesn't know where he is." 23      A Yes, sir. 24      Q Page 8. 25      A Yes, sir.	1        my jaw." 2        Q Well, there's a -- 3        A Or something like that. 4        Q -- "or else" sort of component to that, isn't 5        there? You better not have broken my jaw or what? 6        A I didn't hear a threat or -- or an "or else," 7        sir. 8        Q Okay. 9        A Not that I recall. 10      Q "I can't bite down. Motherfucker, you better 11      not have broke my fucking jaw." That's what he said, 12      right? 13      A Period. Yes, sir. 14      Q So that is just a declarative sentence, in 15      your view? That's -- 16      MR. OSBORNE: Weren't they talking right 17      around there about fourth degree assault or something 18      like that? 19      MR. BENNETT: No, not -- actually, not then. 20      This is later on, actually. This is at the 6:46 mark. 21      A They actually use "motherfucker" several 22      times, as I recall. 23      BY MR. BENNETT: 24      Q I do, too. 25      But, "You better not have broke my fucking	
	123	125
1        Q Does that sound like someone who might be 2        having a mental illness problem? 3        A I think it could be. It could be that, could 4        be a lot of things. Yes, sir. 5        Q Sure. 6        You don't mention the four and a half minutes 7        that -- that Gorman remained on -- putting pressure 8        with one or both knees on David Smith's back, correct, 9        in your report? 10      A Um, I believe that I describe the 11      circumstances of them using force, taking him into 12      custody. I just... I'm not sure what your specific -- 13      you're asking me to -- a negative, I believe. 14      Q Well, do the -- does the words "four and a 15      half minutes" appear there, in your report? 16      A I don't believe so, no, sir. 17      Q Okay. 18      And you don't make any mention of the term 19      "motherfucker." You discuss a lot of things they talk 20      about, but you don't talk about that, right? 21      A No, sir. 22      Q You don't mention the threat about what he 23      would do to him if his jaw was broken, do you? 24      A I don't recall a threat. I recall him 25      saying, "Motherfucker, I -- you better not have broken	1        jaw," causes me to ask, or what? Or else what? 2        MR. OSBORNE: Well, that's not on there, 3        though, Bob. 4        MR. BENNETT: No. 5        MR. OSBORNE: It's not on the videotape 6        either. 7        MR. BENNETT: No, it isn't. 8        THE WITNESS: I guess that's a comment again, 9        sir. 10      BY MR. BENNETT: 11      Q Or you'll kill me? What? I mean -- I 12      don't -- 13      A Is there a question? 14      Q You know, what is the implied -- 15      MR. OSBORNE: Could be you could be charged 16      with a crime. 17      MR. BENNETT: Okay. 18      BY MR. BENNETT: 19      Q The... 20      Was there -- do you -- do you describe any 21      overt activity to monitor consciousness or respiration 22      before he checks the pulse at 7:50, at the 7:50 mark on 23      Exhibit 30? 24      A I'm sorry, by officers -- any affirmative 25      action by the officers on the scene?	

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<p>1       Q   Yeah.</p> <p>2       A   Is that what you're talking about, sir?</p> <p>3       Q   Yeah.</p> <p>4       A   On page 10 I believe I said both are talking to him on a fairly regular basis. They're both asking him if he's okay. They're both asking if he understood him.</p> <p>8       Q   And they -- but they got -- you know, if you talk to someone who is unconscious, what kind of response are you going to get?</p> <p>11      A   Nothing.</p> <p>12      Q   How about the person who's dead?</p> <p>13      A   Nothing.</p> <p>14      Q   Okay. So not getting responses doesn't tell very -- you very much, does it?</p> <p>16      A   That verbal interaction, yes, no, it doesn't tell you very much.</p> <p>18      Q   So you have to do something beyond not getting responses to actually check the level of consciousness or respiration, correct?</p> <p>21      A   Well, there could be other factors, sir.</p> <p>22      Q   Well, you hear on the tape Gorman and Callahan breathing hard from the struggle, correct?</p> <p>24      A   I hear a lot of people breathing hard. I'm not sure I can distinguish who's breathing hard.</p>	<p>126</p> <p>1       camera and the TASER camera video.</p> <p>2       A   I -- I don't know exactly what he did, sir.</p> <p>3       Q   Well, you read his deposition, didn't you?</p> <p>4       A   Who? I'm sorry?</p> <p>5       Q   Case. He's the investigator for Internal Affairs?</p> <p>7       A   I'm sure I did. I don't recall the specific details of it.</p> <p>9       Q   And apparently Case didn't even figure out the violation that Homicide Lieutenant Zimmerman found, correct?</p> <p>12      A   I have no idea.</p> <p>13      Q   Well, he didn't -- you saw what Zimmerman testified to, correct?</p> <p>15      A   I just saw this -- this testimony, yes, sir.</p> <p>16      Q   And you read it before, right?</p> <p>17      A   May have. I'm sure I've read it, but I don't recall it.</p> <p>19      Q   Okay.</p> <p>20      A   There was an awful lot of material in this case.</p> <p>22      Q   Did you review potential criminal statutes to see what might have been brought up to the grand jury?</p> <p>24      A   No, sir.</p> <p>25      Q   Now, you're not conflating the grand jury</p>
<p>127</p> <p>1       There's -- seems to me everybody is breathing hard at some point.</p> <p>3       Q   Okay.</p> <p>4       Now, you go on on page 11 to state that the MPD conducted a bifurcated investigation.</p> <p>6       A   Yes, sir.</p> <p>7       Q   In fact, is that true? There was not a separate investigation onto -- on IA, was there?</p> <p>9       A   Ah, I don't know. What I've seen is the -- they did a voluntary statement that was in the criminal investigation that then went over into the IA investigation.</p> <p>13      Q   Well, no. But the IA investigator did not take a statement under -- with a Garrity warning, correct?</p> <p>16      A   No, he did not. Not that I've seen, no, sir.</p> <p>17      Q   And he didn't take statement -- Sergeant Case didn't take any independent witness statements at all, did he?</p> <p>20      A   When that -- that doesn't answer the question of whether or not it's bifurcated or not. But the Garrity statement certainly is a relevant factor.</p> <p>23      Q   He didn't -- he didn't conduct any investigation beyond letting -- other than -- as far as I can tell, other than doing this timeline from the pen</p>	<p>129</p> <p>1       process with the Internal Affairs process, are you? They're entirely different.</p> <p>3       A   I don't understand your question.</p> <p>4       Q   Well, a grand jury doesn't consider Internal Affairs disciplinary actions, does it?</p> <p>6       A   No.</p> <p>7       Q   They're never even told about various policies of the Minneapolis Police Department, are they?</p> <p>10      A   I don't know. They may or may not have been.</p> <p>11      Q   All right. It's not really within their purview about whether a policy was violated. It's whether a law was violated, a criminal law of the state of Minnesota --</p> <p>15      A   Correct.</p> <p>16      Q   -- correct?</p> <p>17      So they're not -- they're -- they're different analyses, Internal Affairs and a grand jury?</p> <p>19      A   Absolutely. Absolutely.</p> <p>20      Q   And a no bill on a grand jury does not excuse the Internal Affairs and the people that supervise it and exercise disciplinary activity from the investigation from doing their job, does it?</p> <p>24      A   No.</p> <p>25      Q   Okay.</p>

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<p>1        And you haven't read any grand jury minutes 2 or transcript, have you? 3        A No, sir. 4        Q So you don't know what was done there and 5 what wasn't done there? 6        A No idea. 7        Q And you -- did -- when you were back there 8 in -- you didn't do criminal work, it sounds like, 9 in -- at your job in Washington; is that true? 10      A I'm sorry? 11      Q Did you do criminal defense stuff or 12 prosecution in Washington? 13      A Oh, the state of Washington. Actually, yes, 14 I did, sir. 15      Q Okay. Well, then you know a little bit about 16 it. 17      You would have known that as a police 18 officer, maybe as a law clerk and -- to a federal 19 judge, but, you know, there's a -- there's an old 20 saying, at least that I've heard many times, that, you 21 know, if the U.S. attorney wants to indict someone, 22 they could indict a ham sandwich. You heard that 23 before, too? 24      A Yes, I have. 25      Q Okay. And if they don't, they don't -- they</p>	<p>130</p> <p>1        doesn't -- 2        Why don't we go off the record. 3        VIDEOGRAPHER: Off the video record at 4 11:32 a.m. 5        (Discussion held off the record.) 6        VIDEOGRAPHER: We are back on the video 7 record at 11:52 a.m. 8        BY MR. BENNETT: 9        Q I understand that you made a site visit to 10 the YMCA gym on March 12, 2012, correct? 11      A Yes, sir. 12      Q And you went with Officer Callahan and 13 Goman, accompanied by city attorneys Burt Osborne and 14 Tracey Fussy; is that right? 15      A Yes, sir. 16      Q And you didn't allow the officer to review 17 any reports, diagram, photos or videos? 18      A Not with me, did not, no, sir. 19      Q So basically they -- you went there without 20 any firm reference to the record as it existed? 21      A Well, they were the best evidence. They were 22 the ones who did it, so -- 23      Q Well, they -- that was a year and a half ago. 24      The best evidence is the film that occurred 25 contemporaneously with it occurring. They were the --</p>
<p>131</p> <p>1        can get no bills pretty easily too, can't they? 2        A I've not heard that corresponding corollary. 3        Q All right. 4        The -- you didn't mention it, but it's a fact 5 that the -- that the recommendation from the 6 use-of-force review committee was that the MPD receive 7 additional training for all officers on excited 8 delirium syndrome, correct? 9        A Yes, sir. 10      Q And you understand that the medical 11 examiner's with -- of this -- the common jurisdiction 12 found that there was no excited delirium involved, 13 correct? 14      A I don't recall any mention by the medical 15 examiner of excited delirium. 16      Q Well, I think they actually ruled it out, to 17 be perfectly -- there wasn't any -- there wasn't 18 excited delirium in this case, is what Baker said. 19      I -- 20      A I don't -- I don't recall, but... 21      MR. BENNETT: Okay. 22      I want to -- let me -- let me ask you a 23 question -- 24      MR. OSBORNE: Sure. 25      MR. BENNETT: -- first. And the answer</p>	<p>133</p> <p>1        that's the best evidence, isn't it? 2        A No, that's a partial record. It's not 3 complete. It's certainly very relevant. It's 4 certainly very valuable. But it's not a total and 5 complete depiction of everything. 6        Q And you -- you had them walk through their 7 incident to the best of their recollection without any 8 reference to record evidence, correct? 9        A Yes, sir. 10      Q And so you didn't have either the Y video to 11 take you through where they had started and where they 12 ended up, right? 13      A No, sir, did not -- 14      Q Didn't have the TASER video and you didn't 15 have the pen camera video? 16      A No, sir. 17      Q All right. 18      And then you had them independently position 19 you on the floor, and they each took their respective 20 positions on you in the same manner that they had been 21 positioned on Mr. Smith. How could you tell that 22 without reference to the record? 23      A They positioned me to the best of their 24 recollection. 25      Q Well, so it's not necessarily the same</p>

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<p>134</p> <p>1 manner. The best of their recollection is of 2 March 12th, 2012, is what they gave you, right? 3 <b>A Yes, sir.</b> 4 Q And did they have you pointed the same way as 5 Smith? 6 <b>A Yes, sir.</b> 7 Q All right. Now, I take it there -- there was 8 no application of the Scientific Method in this at all, 9 was there? Do you know what the Scientific Method is? 10 <b>A Well, why don't you explain to me what you mean by it.</b> 11 Q Why don't you tell me what the Scientific 12 Method is as you understand it. 13 <b>A I don't know what you're talking about, sir. "Science" could mean a whole range of things.</b> 14 Q Well, there's such a thing called the 15 Scientific Method that experts use to -- in order to 16 make conclusions from events as if they were 17 scientists. And you -- you were not trying to follow a 18 Scientific Method? 19 <b>A I was not trying to find a randomized control study or an experiment in that nature, no, sir.</b> 20 Q And you understand -- have you read Chan's 21 studies? 22 <b>A At some point in time I actually have, yes,</b></p>	<p>136</p> <p>1 BY MR. BENNETT: 2 Q Obviously -- you're not psychotic, are you? 3 <b>A I'm sorry?</b> 4 Q You're not psychotic? 5 <b>A I don't think so, no, sir.</b> 6 Q They didn't Tase you five times? 7 <b>A No, sir.</b> 8 Q You didn't ingest 30-plus Coricidin? 9 <b>A No, sir.</b> 10 Q They did not engage you in a ground fight 11 that lasted at least a minute, correct? 12 <b>A No, sir.</b> 13 Q The... 14 And you knew basically that whenever you 15 wanted them to get off your back, they'd get off your 16 back? 17 <b>A I assumed so, yes, sir.</b> 18 Q Okay. So -- they didn't handcuff you? 19 <b>A No, sir.</b> 20 Q So you really weren't put in the prone 21 restraint position at all, were you? You weren't 22 restrained with your hands handcuffed behind your back? 23 <b>A No, sir, I was not.</b> 24 Q Okay. 25 So you'd agree with me that what you did in</p>
<p>135</p> <p>1 <b>sir.</b> 2 Q Sure. So you know that he writes in his own 3 reports the significant limitations of his study? 4 <b>A Yes, sir.</b> 5 Q But he is actually trying to use the 6 scientific method, isn't he? 7 <b>A Appears to be, yes, sir.</b> 8 Q And he has to take that and run it through an 9 institutional review board that approves 10 experimentation -- scientific experimentation on human 11 subjects? 12 <b>A I recall a lot of that discussion in his deposition, yes, sir.</b> 13 Q And you did not? 14 <b>A No, sir.</b> 15 Q And basically yours is a year-and-a-half- 16 later anecdotal view of what happened from the officers 17 who were involved in a critical incident? 18 <b>A Yes, sir.</b> 19 Q Okay. 20 MR. OSBORNE: It would be offered for nothing 21 more than that. I mean -- 22 MR. BENNETT: Well, yeah. Yeah, I'm going to 23 object to it, as you know. 24</p>	<p>137</p> <p>1 no way replicates what actually transpired in that gym 2 on September 10, 2012, correct? 3 <b>A I won't agree with you that it in no way replicates.</b> 4 Q Well, what ways does it replicate it? 5 <b>A Well, what I asked was the officers to position themselves as they had been relevant (sic) to Mr. Smith.</b> 6 Q Did you double-check whether they were doing 7 that by your viewing the videos? 8 <b>A I certainly have viewed the videos and it's consistent with what they described and showed me.</b> 9 Q On March 12th when it was occurring, did you 10 verify that they were in fact in the positions that 11 they were as depicted in the TASER and pen camera 12 videos? 13 <b>A No.</b> 14 Q Okay. 15 You didn't do anything to replicate the 16 ground fight? 17 <b>A No, sir.</b> 18 Q Nothing to replicate the Tasings? 19 <b>A No, sir.</b> 20 Q Nothing to replicate the condition of the 21 person being held down?</p>

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1      A I don't understand what you mean. 2      Q Well, I mean, for example, Chan makes, at 3      least in some of his studies, makes the people engage 4      in some exercise. 5      A Yes, sir. 6      Q You didn't engage in any exercise -- 7      A No, sir. 8      Q -- before that? 9      A No, sir. 10     Q And basically you were trying to get an idea 11    of what the officers might have done on that day in 12    terms of positioning on the bodies, correct? 13     A The officers' recollection of what they did 14    relative to positioning on the bodies, yes, sir. 15     Q All right. Did you check and see if it was 16    consistent with what they told the grand jury? 17     A No. 18     Q Did you check and see if it was consistent 19    with what they said in their deposition on March 12th? 20     A On the day that I did this? 21     Q Yes. 22     A No, sir. 23     Q Okay. 24     And when you did it, you did it one officer 25    at a time; correct?	1      As far as you know, though, you didn't do 2      anything to double-check their work -- their 3      recollection that day as being reliable and consistent 4      with the videotapes? 5      A On that day, no, sir. 6      Q All right. And you didn't videotape what 7      they did, did you? 8      A No, sir. 9      Q So we can't look at what they did? 10     A No, sir. 11     Q And we rely on your -- who was in the room 12    with you when they did it? 13     A The two city attorneys. 14     Q So basically we got two people who can't 15    really act as witnesses, if I understand the -- unless 16    they want to hire new lawyers. 17     A Well, I -- 18     Q So, I mean -- and you were facedown on the 19    ground? 20     A Correct. 21     Q Okay. 22     Now, I've heard of and actually been involved 23    in some reenactments. 24     A Yes, sir. 25     Q Okay. And the reenactments that I've been		
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1      A Yes, sir. 2      Q Who did you do first? 3      A Callahan. 4      Q All right. And you did it so that Gorman 5      couldn't see what Callahan did and Callahan couldn't 6      see what Gorman did? 7      A That's correct. 8      Q All right. Did Gorman get in the position 9      that he was in, or did he get into the position he 10     remembered Callahan was in as well? 11     A I'm sorry. Excuse me? 12     Q Well, did -- so Gorman put a knee or both 13    knees or switched knees on your back? Did he -- which 14    knee did he use? 15     A Yes, sir. He -- that's what he did. He 16    did -- took the position that he recalled him taking 17    with Mr. Smith. 18     Q Did he hop on your -- on your back with both 19    knees? 20     A Did he hop? 21     Q Yeah. 22     A No, sir, he did not. 23     Q Did he hit you in the head? 24     A No, sir. 25     Q Okay.	1      involved in and been involved in looking at, A, we 2      filmed them all. Have you filmed reenactments? Have 3      you ever done any as a chief? 4      A Yes, sir. 5      Q You've filmed them, haven't you? 6      A Filmed the whole reenactment? 7      Q Yeah. 8      A Um, I think in one case we may have filmed 9      the whole reenactment, but there are others where -- 10     Q You didn't? 11     A No, No, sir. 12     Q Well, if you're going to do a, quote, 13    reenactment, end quote, you want to be sure that you're 14    doing everything as close to the actual event as 15    possible, correct? 16     A Yes, sir. 17     Q All right. This was not even a reenactment, 18    was it? 19     A No, I would not call it that. 20     Q All right. 21     And the officers weren't mad at you? 22     A I'm sorry? 23     Q The officers weren't angry at you? 24     A I really don't know. 25     Q They didn't say anything -- they didn't call		

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<p>142</p> <p>1 you a "motherfucker," I imagine, did they?      2 <b>A No, they did not call me a "motherfucker."</b>      3 Q They didn't discuss criminal charges for you      4 either, I would guess, did they?      5 <b>A I don't believe I committed anything they</b>      6 <b>could charge me for, sir.</b>      7 Q I'm quite sure you didn't, but the...      8 Did you -- did you take notes of any of this?      9 <b>A No, sir.</b>      10 Q Did you record any of it with any      11 audio-recording device?      12 <b>A No, sir.</b>      13 Q So other than everybody's kind of gross      14 recollection, we don't know what you did, right?      15 <b>A Other than a recollection of my report, yes,</b>      16 <b>sir.</b>      17 Q Okay. Now, you say -- well...      18 Officers are supposed to be trained how to      19 deal with the mentally ill, aren't they?      20 <b>A Officers are supposed to be trained, just</b>      21 <b>generally?</b>      22 Q Yeah.      23 <b>A I would say that in general, yes, they should</b>      24 <b>have some level of training.</b>      25 Q Okay.</p>	<p>144</p> <p>1 Q All right. You wrote one thing.      2 <b>A Yes, sir.</b>      3 Q Do you see what you wrote?      4 <b>A Yes, sir, I do.</b>      5 Q Is what you wrote inconsistent with      6 Callahan's statement to Fors and Klund on September      7 15th?      8 <b>A No, sir.</b>      9 Q Okay.      10 Now, you -- you speculate that had Mr. Smith      11 complied with the officers' request, they would have      12 simply walked with him as he exited the building. You      13 don't know that for a fact, do you?      14 <b>A Both the officers said that.</b>      15 Q Okay. Well, they didn't stop putting force      16 on him once -- when he complied and gave up; correct?      17 <b>A By "putting force on him," what do you mean,</b>      18 <b>sir?</b>      19 Q I mean kneeling on him and sitting on him      20 such that he was mechanically asphyxiated.      21 <b>A I -- I can't agree with that. I can agree</b>      22 <b>that they did not -- they -- they were engaged with him</b>      23 <b>the entire time.</b>      24 Q Well, they were placing weight on him,      25 weren't they, while he was in the prone restraint</p>
<p>143</p> <p>1 Now, you see on page 13 in your report that      2 the material reviewed indicates that Mr. Smith was,      3 quote, "combative throughout his interactions with the      4 officers, including during the restraint process."      5 Do you see that?      6 Right here (indicating).      7 <b>A Yes, sir.</b>      8 Q All right.      9 <b>A Yes, sir.</b>      10 Q I read your language correctly?      11 <b>A Yes, sir.</b>      12 Q And that would be inconsistent with the      13 statement given at the first opportunity by Officer      14 Callahan where he basically said that once he was --      15 "arms were fully behind his back and handcuffed      16 together, it was at this time that Smith seemed to calm      17 down a bit and was not resisting as hard. I believed      18 that Smith was giving up at this time and complying."      19 That is not the same as being combative      20 throughout his interactions with the officers,      21 including during the restraint process, is it?      22 <b>A You've read me two very long things and asked</b>      23 <b>me a question. Can you please ask it --</b>      24 Q All right.      25 <b>A -- again?</b></p>	<p>145</p> <p>1 position?      2 <b>A They were placing weight on him, yes, sir.</b>      3 Q Okay. How much weight you don't know?      4 <b>A Exactly? No, sir.</b>      5 Q And did you -- did you have Gorman -- how      6 much weight did Gorman place on you? Half of his      7 weight? A third of his weight?      8 <b>A What he was asked to do is put weight that,</b>      9 <b>to the best of his recollection, is the same as he put</b>      10 <b>on Mr. Smith.</b>      11 Q Did you ask him about that?      12 <b>A Pardon me?</b>      13 Q Did you ask him how much weight he did?      14 <b>A No.</b>      15 Q I mean, you realize that he could -- you can      16 modulate how much weight you put on one knee versus      17 another, correct?      18 <b>A Certainly.</b>      19 Q All right. I mean, I was over at the      20 national duels, and you can have all of your -- you can      21 have both of your legs touching and being -- applying      22 different points of weight at different -- at different      23 parts on somebody else's body, though, correct?      24 <b>A I have no idea what you're referring to, sir.</b>      25 Q All right. Well, forget it. Get it from</p>

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<p>146</p> <p>1 somebody else.</p> <p>2 You'd agree with me that your perceptions</p> <p>3 about what happened during this visit with Gorman and</p> <p>4 Tracey Fussy and Burt Osborne and Callahan at the Y on</p> <p>5 March 12th that didn't even amount to a reenactment</p> <p>6 wouldn't be relevant to what David Smith felt on</p> <p>7 September 10, 2010, correct?</p> <p>8 A No.</p> <p>9 Q September 9th --</p> <p>10 A I would not agree with you.</p> <p>11 Q You wouldn't? How would it be relevant?</p> <p>12 A What I was trying to do was understand the</p> <p>13 officers' positioning on Mr. Smith's body.</p> <p>14 Q Okay. But you didn't verify that with any of</p> <p>15 the available video evidence, correct?</p> <p>16 A On that day, no.</p> <p>17 Q On any day. I mean, since you didn't -- you</p> <p>18 couldn't verify it today if you wanted to, could you?</p> <p>19 A Sure. I can certainly testify as to how they</p> <p>20 positioned themselves on me and that I've looked at the</p> <p>21 videos and whether they're consistent or inconsistent.</p> <p>22 Q That's if you remember right. But you could</p> <p>23 have filmed it; we'd have known, right?</p> <p>24 A Is your question could it have been filmed?</p> <p>25 Q Could it have been filmed? Could you have</p>	<p>148</p> <p>1 how they were positioned on Mr. Smith while he was</p> <p>2 prone on the gym floor.</p> <p>3 Q Okay. Where did he put his knee?</p> <p>4 A Variety of positions on my back.</p> <p>5 Q Did he say which one was the one he used?</p> <p>6 A Well, he moved, because he switched from one</p> <p>7 knee to the other, just as he did in the actual</p> <p>8 incident.</p> <p>9 Q How do you know he moved correctly?</p> <p>10 A I'm sorry?</p> <p>11 Q How do you know that he described or placed</p> <p>12 his knee correctly?</p> <p>13 A I know that he did it to the best of his</p> <p>14 ability.</p> <p>15 Q How do you know he did it correctly?</p> <p>16 A Correctly as compared to what, sir?</p> <p>17 Q Empirically correctly; that is, the same.</p> <p>18 A There isn't 100 percent record of where his</p> <p>19 knee is.</p> <p>20 Q Okay.</p> <p>21 Tell me, how is it that you reconcile the</p> <p>22 fact that you say Mr. Smith was combative throughout</p> <p>23 his interactions with the officers, including during</p> <p>24 the restraint process, with Callahan's five-day-old</p> <p>25 recollection of it with Fors? How do you reconcile</p>
<p>147</p> <p>1 documented it with still photos?</p> <p>2 A Yes.</p> <p>3 Q Could you have recorded it audio -- with</p> <p>4 audio equipment?</p> <p>5 A Yes, sir, I could have.</p> <p>6 Q You did none of those?</p> <p>7 A I did not.</p> <p>8 Q And you said it isn't even good enough to be</p> <p>9 a reenactment, correct?</p> <p>10 A Well, it's a -- I said that in the context of</p> <p>11 which you were asking me about full-blown reenactments</p> <p>12 with filming. And so we were having a discussion about</p> <p>13 filming the entire reenactment.</p> <p>14 Q You said some reenactments you filmed and</p> <p>15 some you didn't, right?</p> <p>16 A That's correct.</p> <p>17 Q But they were reenactments nonetheless. You</p> <p>18 tried to replicate the event, correct?</p> <p>19 A The full-blown event. In this case I was not</p> <p>20 trying to do that, no, sir.</p> <p>21 Q Correct.</p> <p>22 So how you felt about not -- about some</p> <p>23 individualized part of an event, how would that be</p> <p>24 relevant to --</p> <p>25 A I was focused on that individualized part of</p>	<p>149</p> <p>1 that?</p> <p>2 A Well, he says, "He seemed to calm down a</p> <p>3 bit" --</p> <p>4 Q Yes.</p> <p>5 A -- "and was not resisting as hard."</p> <p>6 Q Yes.</p> <p>7 A So if he's not resisting as hard --</p> <p>8 Q Read the rest -- and then the next sentence.</p> <p>9 A "I believed that he was giving up at this</p> <p>10 time and complying."</p> <p>11 Q "Giving up and complying."</p> <p>12 A Right. So the two sentences are</p> <p>13 inconsistent.</p> <p>14 Q Okay. Or that -- or he became more compliant</p> <p>15 as he went on, right? That's -- I believed he was</p> <p>16 giving up and complying is not being combative, is it?</p> <p>17 A That sentence? No, sir.</p> <p>18 Q Okay.</p> <p>19 And as we established, Callahan was there and</p> <p>20 you weren't?</p> <p>21 A Yes, sir.</p> <p>22 Q And you didn't think that was important</p> <p>23 enough to include in your report, that I was giving</p> <p>24 up -- I believed that he was giving up and complying?</p> <p>25 A I believe I covered that on page 10 of my</p>

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<p>1 report.</p> <p>2 Q What language do you look at for that?</p> <p>3 A When they talk about fully positioning him.</p> <p>4 So --</p> <p>5 Q Find -- all right. Where is this? Where</p> <p>6 does it say --</p> <p>7 A It's -- go ahead. I'm sorry.</p> <p>8 Q Just tell me where you're looking at.</p> <p>9 A I'm just looking at the bottom of the first</p> <p>10 paragraph. And then it continues throughout that page.</p> <p>11 It's describing the incident.</p> <p>12 Q I know. But nowhere does it say Callahan</p> <p>13 believed he was giving up and complying. It doesn't</p> <p>14 say that.</p> <p>15 A You're asking me if I quoted from Callahan?</p> <p>16 The answer is no, sir.</p> <p>17 Q Well, you don't even get the concept in here.</p> <p>18 Find me language that you think gets that concept in</p> <p>19 your report.</p> <p>20 A I think what he gets to is they got him</p> <p>21 handcuffed and they've secured him, he's positioned on</p> <p>22 him to prevent him from getting up or rolling. They</p> <p>23 remained in position.</p> <p>24 Q Well, that they accomplished, right? He</p> <p>25 didn't get up or roll.</p>	<p>150</p> <p>1 you went to the YMCA gym on March 12th, 2012?</p> <p>2 A Not that I recall, sir, no.</p> <p>3 Q Okay. Never talked to Callahan at all about</p> <p>4 that?</p> <p>5 A I don't believe so, no, sir.</p> <p>6 Q Okay.</p> <p>7 Because if he's giving up, you don't have to</p> <p>8 pin him to the ground, do you?</p> <p>9 A If someone had completely surrendered and had</p> <p>10 given up, no, you don't.</p> <p>11 Q How do you completely surrender if you're</p> <p>12 handcuffed in the prone position? What would you do to</p> <p>13 completely surrender?</p> <p>14 A You'd stop struggling. This suggests that he</p> <p>15 was still resisting. He's not resisting as hard.</p> <p>16 Q That was one sentence. And read the next one</p> <p>17 again.</p> <p>18 A The two are -- I said the two sentences are</p> <p>19 in conflict.</p> <p>20 Q Or they're chronologically correct, that he</p> <p>21 went from not resisting as hard to giving up and</p> <p>22 complying.</p> <p>23 A That would be one interpretation.</p> <p>24 Q Certainly one that -- that Officer Callahan</p> <p>25 came to.</p>
<p>151</p> <p>1 A No. That's right.</p> <p>2 Q Ever. Right?</p> <p>3 A Is that a comment or a question, sir?</p> <p>4 Q He never got up again, did he?</p> <p>5 A Well, they rolled him over, certainly.</p> <p>6 Q Yeah, okay.</p> <p>7 Where do you say that -- at the point in time</p> <p>8 that he was handcuffed, you say, "Mr. Smith was</p> <p>9 facedown on the gym floor while Callahan was positioned</p> <p>10 on top of his legs, both knees on the ground on either</p> <p>11 side of his legs (Smith's legs), basically pinning them</p> <p>12 and preventing Mr. Smith from getting up, kicking, or</p> <p>13 rolling over."</p> <p>14 A Yes, sir.</p> <p>15 Q Then you say -- but you don't say that at</p> <p>16 this point in time Mr. Smith, by Callahan's own</p> <p>17 admission, was giving up and complying, do you?</p> <p>18 A I don't know if he was giving up and</p> <p>19 complying.</p> <p>20 Q Well, you do if you listen -- if you read</p> <p>21 Mr. Callahan's -- or Officer Callahan's statement,</p> <p>22 right?</p> <p>23 A It's in conflict with the sentence before</p> <p>24 that.</p> <p>25 Q Okay. Well, did you ask him about that when</p>	<p>153</p> <p>1 A I don't know that.</p> <p>2 Q Okay.</p> <p>3 Your opinion number three is an interesting</p> <p>4 opinion to me. Page 16, you say, "During the officers'</p> <p>5 efforts to gain control of Mr. Smith during his violent</p> <p>6 resistance, the placing of Mr. Smith in a prone</p> <p>7 position to facilitate handcuffing and control was</p> <p>8 appropriate."</p> <p>9 You say that, correct?</p> <p>10 A Yes, sir.</p> <p>11 Q After he was placed in the prone position for</p> <p>12 the next four and a half minutes, do you find that</p> <p>13 their activities were appropriate?</p> <p>14 A Their -- can you be a little more detailed</p> <p>15 about your question, sir?</p> <p>16 Q You're talking about the efforts to gain</p> <p>17 control and the placing, in opinion number three.</p> <p>18 A Yes, sir.</p> <p>19 Q And I'm talking about for the four and a half</p> <p>20 minutes after he was done being placed --</p> <p>21 A Uh-huh.</p> <p>22 Q -- while they continued to put pressure on</p> <p>23 him, such that the Hennepin County medical examiner</p> <p>24 believes they committed a homicide by mechanically</p> <p>25 asphyxiating him. Is it your view and opinion to a</p>

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<p>1 reasonable degree of professional certainty that      2 their -- their conduct was appropriate?</p> <p>3     <b>A I think you're going to have to break that</b>      4 down. You've thrown a whole bunch of things into that      5 question, sir.</p> <p>6     Q What don't you understand about it?</p> <p>7     <b>A Well, you're adding things about the medical</b>      8 <b>examiner. So --</b></p> <p>9     Q Well, you know what the medical examiner      10 said. You don't disagree with him because you're not a      11 medical guy. You accept what the medical examiner      12 says, right?</p> <p>13     <b>A So --</b></p> <p>14         MR. OSBORNE: The medical examiner, though,      15 Bob, didn't say he committed a homicide.</p> <p>16         MR. BENNETT: Yeah, he did.</p> <p>17         MR. OSBORNE: He said the manner of --      18 it's -- it's the -- the cause of death or the manner of      19 death.</p> <p>20         MR. BENNETT: Is a homicide. That's death      21 caused by another.</p> <p>22         MR. OSBORNE: No. I think we just agree that      23 the medical examiner's report says what it says.</p> <p>24 BY MR. BENNETT:</p> <p>25         Q All right. The medical examiner found that</p>	<p>1 know, right?</p> <p>2     <b>A No. The answer is I'm -- I'm testifying it</b>      3 <b>was several minutes, but I didn't put a watch on it.</b></p> <p>4     Q Well, did you make any effort to time it?</p> <p>5     <b>A I was on the ground for a period of time</b>      6 <b>while he was kneeling on me.</b></p> <p>7     Q How long was Callahan on you?</p> <p>8     <b>A Again, for some period of time.</b></p> <p>9     Q Do you know how long?</p> <p>10     <b>A I did not time it.</b></p> <p>11     Q Now, if Officer Gorman knelt on your back and      12 Callahan wasn't there -- and you weren't handcuffed,      13 right?</p> <p>14     <b>A No, sir, I was not handcuffed.</b></p> <p>15     Q You could have gotten up, right?</p> <p>16     <b>A You mean I could have forced my way up --</b></p> <p>17     Q Yeah.</p> <p>18     <b>A -- when he was on my back?</b></p> <p>19     Q Yeah.</p> <p>20     <b>A I certainly could have struggled with him,</b>      21 yes.</p> <p>22     Q Do you believe you could have gotten up?</p> <p>23     <b>A I have no idea.</b></p> <p>24     Q Well, you could have easily gotten out of the      25 way of one knee, correct? You can't hold someone to</p>		
<p>1 the manner of death was a homicide, correct?</p> <p>2     <b>A Yes, sir.</b></p> <p>3     Q And that the -- the -- it was -- in fact, he      4 says in the part you read, it was -- it was the      5 pressure from Gorman's knees or knees -- knee or knees      6 that caused the mechanical asphyxia. You read that,      7 right? Do you accept that?</p> <p>8     <b>A We read a portion of his deposition, yes,</b>      9 sir.</p> <p>10     Q Well, you didn't want to read both, both      11 days.</p> <p>12         But what I'm getting at is after the      13 restraint, do you find -- after they're done getting      14 him in the prone restraint position with Gorman      15 positioned how he was positioned and Callahan      16 positioned as he was positioned, for the next four and      17 a half minutes after that, are you saying that their      18 activities were appropriate? Yes or no?</p> <p>19     <b>A Their activities were reasonable, yes.</b></p> <p>20     Q Okay. Thanks.</p> <p>21         How long did Gorman keep his knee or knees on      22 you?</p> <p>23     <b>A It was several minutes, at least. I didn't</b>      24 <b>time it.</b></p> <p>25     Q How do you know? The answer is you don't</p>	<p>155</p> <p>1 the ground with one knee, can you?</p> <p>2     <b>A Well, I'm not a wrestler. Your colleague</b>      3 <b>would be a wrestler. But certainly I -- he had me</b>      4 <b>securely -- in a secure position. Could I have gotten</b>      5 <b>up? I believe I could have --</b></p> <p>6     Q Sure.</p> <p>7     <b>A -- yes, sir.</b></p> <p>8         I should say, could I have fought my way up?</p> <p>9         Certainly, if that was the question.</p> <p>10     Q Uh-huh.</p> <p>11         Now, you mention that Officer Callahan can be      12 heard to ask, "Is he breathing?" On page 19 of your      13 report. Last sentence.</p> <p>14     <b>A Where is it? I'm sorry?</b></p> <p>15     Q Bottom.</p> <p>16     <b>A On 19? I think we're looking at different</b>      17 <b>documents, sir.</b></p> <p>18     Q 17. Excuse me. Pardon me.</p> <p>19     <b>A Yes, sir.</b></p> <p>20     Q And Callahan testified that that was not a      21 serious question, correct?</p> <p>22     <b>A I don't recall that, sir.</b></p> <p>23     Q Okay.</p> <p>24         Gorman answers, you say, in the affirmative?</p> <p>25     <b>A Yes, sir.</b></p>	157	

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<p style="text-align: right;">158</p> <p>1 Q Do you know if Gorman -- and Gorman testified 2 he didn't do anything to check. You're aware of that? 3 A I don't recall from his deposition 4 specifically what he said about this. 5 Q In fact, we know as a matter of fact that 6 that's impossible, don't we? 7 A No, sir. 8 Q You don't think it was impossible that two 9 and a half minutes after he's done agonally breathing, 10 he could have been breathing? 11 A I've already answered your question, sir. 12 I'm not familiar with agonal breathing. I don't know 13 when he -- he died, so I'm -- I can't tell you what, I 14 can't -- I certainly can't answer the question "it's 15 impossible." 16 Q When you're agonally breathing, you 17 understand that all the medical people say you're very 18 close to death? 19 A I don't understand that, no, sir. 20 Q You don't? You didn't read those 21 depositions? 22 A If I -- I don't recall seeing it in that 23 language, sir. 24 Q Okay. All right. 25 A I've seen it called a variety of different</p>	<p style="text-align: right;">160</p> <p>1 A I understand that you're applying pressure. 2 Q You understand -- 3 A I've not heard it -- I've not heard it 4 described as "mechanical force," sir. 5 Q Well, I'm using a device. 6 A Okay. 7 Q I could use my fist, or I can use the pen. 8 A Okay. 9 Q Those would both be mechanical applications 10 of force, would they not? 11 A I don't know. If you'd like me to use the 12 definition, that's fine. 13 Q Well, I'd like you to use one that is common 14 sense and like you were taught in physics class in high 15 school. That's what I was taught, but maybe you didn't 16 take physics. 17 Can you point to me where in this document 18 you contained -- where in this document -- start over. 19 Can you tell me where in this document it is 20 contained any facts to support an opinion from you that 21 the officers properly monitored Smith's condition? 22 A I think there's a number of discussion points 23 in here where they are asking him; Callahan is checking 24 on him; they continue to ask him questions throughout 25 this encounter.</p>
<p style="text-align: right;">159</p> <p>1 kinds of breathing. 2 Q Okay. 3 Again, you say, "The actions of" -- on page 4 18: "The actions of Gorman and Callahan were 5 reasonable in their efforts to gain control of Smith." 6 But you don't -- you don't ever specifically 7 say in this report that they were reasonable in their 8 efforts once they had gained control of Mr. Smith, do 9 you? 10 A I don't believe I parse the incident in that 11 fashion, no, sir. 12 Q Well, there's this pesky little four and a 13 half minutes after they gain control in which they 14 continue to put pressure on him, downward pressure, 15 mechanical pressure. You understand that, right? 16 Where they're both doing it? 17 A I don't know what you mean by "mechanical 18 pressure." I'm aware of the fact that they're both -- 19 Q A downward force is mechanical force. You 20 understand that, don't you? 21 A I'm not familiar with that terminology, no, 22 sir. 23 Q Okay. So I'm pushing down on this piece of 24 paper with a pen. You don't understand that I'm 25 applying a mechanical force?</p>	<p style="text-align: right;">161</p> <p>1 Q But we've established that asking dead or 2 unconscious people questions isn't going to do you very 3 much good, is it? 4 A If you're asking dead or unconscious people, 5 no. 6 Q Okay. Any other monitoring conduct other 7 than asking dead or unconscious people questions? 8 A You're merging a couple of things, sir. 9 Q Well, I mean -- 10 A So let's separate the question, please. 11 Q Other than asking him questions, did they do 12 anything before they at 7:53 took his pulse? 13 A Is that the first taking of the pulse or the 14 second, sir? 15 Q The first, according to Callahan's testimony 16 and Case's (indicating document). 17 A Yeah, I believe if you look at this, there's 18 a whole bunch of things where they're talking to him 19 prior to that, asking a bunch of questions, and there's 20 a period of time when both of them at different times 21 lean over closer towards his -- his face and head. 22 Q You could see his eyes were open, his eyes -- 23 they were unblinking on the videotape, couldn't you? 24 A At a certain point in time, yes, sir. 25 Q Okay.</p>

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<p>162</p> <p>1 A Yes, sir. I could see that they were open. 2 I don't know that I could see they were unblinking, but 3 I could see they were open. 4 Q They were -- his eyelids were fixed, weren't 5 they? 6 A I didn't see that, no, sir. I saw that his 7 eyes were open. 8 Q Okay. 9 A It's a side view that I -- I recall right 10 now. 11 Q You read Dolan's deposition? 12 A Chief Dolan? Yes, sir, I've read his 13 deposition. 14 Q And he admits to applying a subjective 15 standard to determine discipline for Fourth Amendment 16 violations, correct? 17 A I didn't understand it that way, no, sir. 18 Q Well, he said he didn't believe the officers 19 meant to do anything wrong. That's a subjective 20 analysis, isn't it? 21 A That would be, yes, sir. 22 Q Okay. And that's why he didn't discipline 23 them? 24 A No, I didn't see that, sir. 25 Q Okay.</p>	<p>164</p> <p>1 sir. 2 Q Well, first of all, the police doesn't decide 3 to call grand juries. Right? Police departments don't 4 do that; that's not their -- within their purview. 5 A If you're asking if a police department 6 impanels a grand jury -- 7 Q Yeah. 8 A Not in my experience, no, sir. 9 Q No. No. 10 A Might be true somewhere in this country; I 11 don't know. 12 Q But it isn't true here, as far as you know. 13 The police -- the Hennepin County Attorney's Office 14 decides whether to impanel a grand jury or not, 15 correct? 16 A Impanel? I have no idea. 17 Q To call a grand jury, to bring a -- any -- 18 they decide what to bring in front of the grand jury? 19 A I -- I don't know the practice here. 20 Q Well, the practice is not for the MPD to 21 submit a case to the grand jury. 22 In fact, that didn't happen, did it? 23 A I'm sorry? 24 Q MPD doesn't -- 25 A The case was considered by the grand jury.</p>
<p>163</p> <p>1 You say -- this -- you say that "Mr. Ryan 2 opines that Chief Dolan has introduced the subjective 3 use-of-force analysis into the Minneapolis Police 4 Department." 5 Do you quarrel with that? 6 A Can you tell me where you are reading, sir? 7 Q Page 21. 8 A Yes, sir. 9 Q And that's true, isn't it? 10 A No, I didn't agree with it. 11 Q Well, that's what he testified, that he would 12 have -- he didn't discipline them because he think -- 13 thought that he didn't -- they didn't mean to do it. 14 A I don't recall that as his testimony, sir. 15 Q Then the next sentence says, "It's critical 16 to remember that the MPD submitted this case to the 17 grand jury for review." 18 Why is that critical to remember? It doesn't 19 have anything to do with discipline. 20 A It's -- it's certainly indicative of a 21 thorough follow-through to this. There's an awful lot 22 of cases that are not submitted criminally and not 23 submitted to grand jury, in my experience. 24 Q In fact, it's just wrong factually, isn't it? 25 A I -- I -- I don't understand the question,</p>	<p>165</p> <p>1 Q You say -- I'm just -- you're the guy -- you 2 know, you're the language parser here. You say that 3 the -- "It is critical to remember that the MPD 4 submitted a case to the grand jury for review." That 5 is in fact false, is it -- isn't it? 6 A Not to my knowledge, no, sir. 7 Q Oh. Who -- tell me what document you rely on 8 to support that fact. 9 A I don't recall specifically, but I've been 10 informed that this case was presented -- was presented 11 to the grand jury. So that's a -- that's -- 12 Q I don't disagree with you. But by the 13 Hennepin County Attorney's Office, not by the MPD. The 14 MPD has nothing to do with -- 15 A Well, the MPD conducted that investigation, 16 prepared that investigation, and then handed that for 17 presentation to the grand jury. 18 Q Well, they handed it to the county attorney 19 for a decision. Right? 20 A They -- it went to the grand jury. It wasn't 21 the county attorney that unilateral -- 22 Q Well, I didn't write that the MPD submitted a 23 case to the grand jury. You did that, right? 24 A That's right. 25 Q You don't know if it's right or not, as you</p>

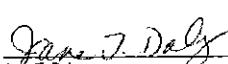
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<p>166</p> <p>1 sit here today?</p> <p>2 A That is my understanding, that this case was</p> <p>3 submitted to the grand jury by the police department.</p> <p>4 Q By the police department?</p> <p>5 A Correct.</p> <p>6 Q Okay. All right. Thanks.</p> <p>7 And when you say, "That is far from the chief</p> <p>8 applying any view of his own to the process; he is</p> <p>9 turning over the determination to an outside entity,"</p> <p>10 he doesn't turn over his disciplinary proceedings to an</p> <p>11 outside entity, does he?</p> <p>12 A To the grand jury?</p> <p>13 Q Yeah.</p> <p>14 A No, sir.</p> <p>15 Q So what are you trying to say there?</p> <p>16 A What I'm saying is that he -- there is an</p> <p>17 outside, independent review of the facts of this case.</p> <p>18 Q No, you said he is turning over the</p> <p>19 determination to an outside entity. What does that</p> <p>20 mean?</p> <p>21 A It means --</p> <p>22 Q You're talking -- is "he" Dolan?</p> <p>23 A To the best of my knowledge, yes.</p> <p>24 Q How is he turning over the determination to</p> <p>25 an outside entity?</p>	<p>168</p> <p>1 Q She was -- eventually became the investigator</p> <p>2 for the workplace investigation unit in 2005?</p> <p>3 A One of a number. Wasn't -- she was not a</p> <p>4 sole.</p> <p>5 Q What is the WIU, workplace investigation</p> <p>6 unit?</p> <p>7 A It was a small unit created to look into</p> <p>8 hostile workplace environment issues, retaliation</p> <p>9 issues, other kinds of particular workplace complaints.</p> <p>10 Q Did she -- well, let me ask you this: Were</p> <p>11 you engaging in intimate relationships with any women</p> <p>12 working at the LAPD during your time as deputy chief?</p> <p>13 MR. OSBORNE: Objection; relevance.</p> <p>14 MR. BENNETT: Depends on his answer.</p> <p>15 A I'm actually not going to go through that</p> <p>16 lawsuit again. I was dismissed from that lawsuit by --</p> <p>17 at summary judgment. So if you'd like to go through</p> <p>18 the details, I think you're probably going to have to</p> <p>19 go a little further. But I was dismissed.</p> <p>20 BY MR. BENNETT:</p> <p>21 Q Just depends on -- you can -- that's fine.</p> <p>22 I'm asking you just -- you can give me a yes or no</p> <p>23 answer. Were you engaging in intimate relationships</p> <p>24 with any women working at the LAPD during your time as</p> <p>25 deputy chief? Yes or no?</p>
<p>167</p> <p>1 A Submitting the case to the grand jury.</p> <p>2 Q All right. So now it's not just the MPD,</p> <p>3 it's Dolan submitted the case to grand jury; is that</p> <p>4 right?</p> <p>5 A Well, Dolan is the leader of the MPD.</p> <p>6 Q Okay. Okay. All right.</p> <p>7 How many times have you been named defendant</p> <p>8 in a lawsuit before?</p> <p>9 A I don't know exactly.</p> <p>10 Q A lot?</p> <p>11 A No, I wouldn't say that. Depends on how you</p> <p>12 define "a lot."</p> <p>13 Q In May of 2006 were you named as a defendant</p> <p>14 in a case brought by Ms. Ya-May Christle?</p> <p>15 A Yes.</p> <p>16 Q She was an officer that was promoted several</p> <p>17 times and eventually began working in Internal Affairs</p> <p>18 for the LAPD in 2003?</p> <p>19 A I don't know when she worked for the LAPD,</p> <p>20 what year she started.</p> <p>21 Q Okay. Forget the year. Was she promoted --</p> <p>22 was -- she's an officer who you know to be promoted</p> <p>23 several times and worked in Internal Affairs?</p> <p>24 A I know her to have been promoted once. She</p> <p>25 was a sergeant. I don't know about "several times."</p>	<p>169</p> <p>1 A I guess I don't -- I would like to talk to my</p> <p>2 lawyer about that for just a second, if you don't mind.</p> <p>3 MR. BENNETT: All right. We can break and</p> <p>4 talk to your lawyer.</p> <p>5 VIDEOGRAPHER: Off the video record at</p> <p>6 12:34 p.m.</p> <p>7 (Recess taken.)</p> <p>8 VIDEOGRAPHER: We are back on the video</p> <p>9 record. The time is 12:41 p.m.</p> <p>10 MR. OSBORNE: Bob, I -- you know, I guess</p> <p>11 I'll just have a standing objection to the relevance of</p> <p>12 any of this, and --</p> <p>13 MR. BENNETT: Well, it'll depend on how he</p> <p>14 answers, if it becomes relevant. If he answers</p> <p>15 truthfully, I guess it won't be irrelevant, it -- it</p> <p>16 will be fine. You know, we can decide what, you know,</p> <p>17 is relevant depending on the answers. That's -- that's</p> <p>18 the trouble with this line of questioning.</p> <p>19 MR. OSBORNE: All right.</p> <p>20 Was there a question pending when we took a</p> <p>21 break?</p> <p>22 BY MR. BENNETT:</p> <p>23 Q I think it was, were you engaging in intimate</p> <p>24 relationships with any women working at the LAPD during</p> <p>25 your time as deputy chief?</p>

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1	<b>A Yes.</b>	1	<b>There were multiple allegations in the</b>
2	Q Did you violate any LAPD policies by engaging	2	<b>lawsuit, to the best of my recollection.</b>
3	in said relationships?	3	Q Have you ever discussed with other
4	<b>A I don't -- I don't exactly know, no, sir.</b>	4	individuals who hired you to do expert consulting
5	Q Did you violate any LAPD policies by not	5	about -- other than Mr. Osborne -- about not putting
6	reporting the relationships to your superior officer?	6	you on the stand as a result of that lawsuit or that
7	<b>A That's the only question, whether or not</b>	7	conduct?
8	<b>there would have been a violation there.</b>	8	<b>A No, sir.</b>
9	Q Were you disciplined for that?	9	<b>(Reporter's Note: Sotto vocce communication</b>
10	<b>A No, sir.</b>	10	<b>between Mr. Bennett and Mr. Storms.)</b>
11	Q Did it have anything to do with your	11	MR. STORMS: Can we go off the record for a
12	departure from LAPD?	12	second?
13	<b>A Absolutely none.</b>	13	MR. BENNETT: Yeah, let's go off the record.
14	Q What is the Bradbury Building?	14	VIDEOGRAPHER: Off the video record at
15	<b>A It's an office building in downtown Los</b>	15	12:44 p.m.
16	<b>Angeles.</b>	16	<b>(Off the record.)</b>
17	Q Is that where the LAPD's Professional	17	VIDEOGRAPHER: We are back on the video
18	Standards Bureau worked?	18	record. It is 12:51 p.m.
19	<b>A It's one of the buildings.</b>	19	BY MR. BENNETT:
20	Q Is that the bureau -- was the bureau part of	20	Q Mr. Berkow, we just had the opportunity to
21	your duty assignment as deputy chief?	21	view a training video that was done at least in part by
22	<b>A Yes, sir.</b>	22	the New York City medical examiner and the New York
23	Q Did you maintain an office in that building	23	City Police Department and has now been utilized for
24	to sleep in?	24	training in the Minneapolis Police Department. Did you
25	<b>A Not an office to sleep in, no, sir. Just</b>	25	get a chance to look at the video?
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1	<b>a -- there was a sleep room.</b>	1	<b>A Yes, sir.</b>
2	Q The...	2	Q And have you received training from either
3	Do you know who Andrea Balter is?	3	medical or law enforcement professionals similar to
4	<b>A Yes, sir.</b>	4	that, expressed in that video?
5	Q Did she sue you and the LAPD and the City of	5	<b>A I don't recall receiving training. Certainly</b>
6	Los Angeles?	6	<b>read articles that...</b>
7	<b>A No.</b>	7	Q Were consistent with it?
8	MR. BENNETT: Oh, is that Christle?	8	<b>A That discuss some of these same issues, yes,</b>
9	BY MR. BENNETT:	9	<b>sir.</b>
10	Q Who -- who -- when you say what lawsuit you	10	Q Do you have any disagreement with the
11	were dismissed in, was that Christle's lawsuit?	11	training video provided by the New York City and the
12	<b>A Yes.</b>	12	Minneapolis Police Department?
13	Q And that's the one you were -- you were	13	<b>A In a broad sense, no, sir.</b>
14	dismissed individually, but they paid over a million	14	Q Okay. Are you aware of training of that type
15	dollars or got a jury verdict in excess of a million	15	being provided to the LAPD officers?
16	dollars on the retaliation claim?	16	<b>A Not that I recall, no, sir. Not of that</b>
17	<b>A There were a number of defendants. I was</b>	17	<b>specifically.</b>
18	<b>dismissed. I don't -- I don't know what the exact</b>	18	Q Okay. Now, you saw them talking about
19	<b>result was.</b>	19	kneeling on the officer -- on the subject, correct?
20	Q Was the gist of her lawsuit against you and	20	<b>A I heard a variety of things about being on</b>
21	the City of Los Angeles that she was retaliated against	21	<b>someone's back.</b>
22	for reporting your misconduct related to -- relating to	22	Q Including kneeling?
23	a sexual relationship and the handling of computer	23	<b>A Could have been. I -- I didn't memorize the</b>
24	evidence in a criminal matter?	24	<b>video.</b>
25	<b>A No. Not to my knowledge, no, sir.</b>	25	Q Did you see the video images of the person

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1	kneeling with one knee on the back?	1	MR. BENNETT: Whoever speaks.
2	A I saw a number of people on the back of an	2	(The videotaped deposition of MICHAEL BERKOW
3	individual, yes, sir. A swarm.	3	was concluded at 12:57 p.m.)
4	Q One of them kneeling with one knee, right,	4	(Reporter's Note: Exhibit 6 was marked for
5	that you could see over the top of his neck? From	5	identification once transcription was completed.)
6	the -- approaching him from the neck/shoulder area down	6	
7	to the mid-scapula?	7	
8	A I don't -- I may have. I don't -- I saw a	8	
9	number of people on the backs of these individuals.	9	
10	Q Okay. And you also heard the -- the -- the	10	
11	warning not to restrict the movement of the legs of the	11	
12	individuals, correct?	12	
13	A Not to restrict the movement --	13	
14	Q Not to hold the legs down, not to tie them	14	
15	up, not to hobble them. There were several examples	15	
16	they gave about not restraining the legs as well.	16	
17	A Actually, I thought I heard something that	17	
18	says tie -- tie the legs, but don't hobble them, I	18	
19	thought I heard.	19	
20	Q No, I don't think that was there, but...	20	
21	A Well --	21	
22	Q I guess the -- it'll --	22	
23	A I've seen it once.	23	
24	MR. STORMS: Should we make that video an	24	
25	exhibit?	25	
	175		177
1	MR. BENNETT: Hmmm?	1	STATE OF MINNESOTA: : CERTIFICATE
2	MR. STORMS: Should we make that video an	2	COUNTY OF HENNEPIN:
3	exhibit?	3	I, Jane T. Doby, Registered Merit Reporter, a
4	MR. BENNETT: Yeah, we probably ought to	4	Notary Public in and for the County of Hennepin,
5	make -- have we marked this -- that training video	5	State of Minnesota, certify that the foregoing is
6	anywhere?	6	a true record of the testimony given by MICHAEL BERKOW,
7	MR. OSBORNE: No.	7	who was first duly sworn by me, having been taken on
8	MR. BENNETT: Let's mark it. So that can be	8	February 25, 2013, at Gaskins Bennett Birrell Schupp,
9	Berkow 5.	9	333 South Seventh Street, Suite 2900, Minneapolis,
10	(Exhibit 5 was marked for identification.)	10	Minnesota, in my presence and reduced to writing in
11	I have no further questions.	11	accordance with my stenographic and computerized notes
12	MR. OSBORNE: We'll read and sign.	12	made at said time and place;
13	VIDEOGRAPHER: This concludes the video	13	
14	deposition. The time is 12:54 p.m.	14	I further certify that I am not a
15	(Discussion held off the record.)	15	relative or employee or attorney or counsel of any
16	MR. BENNETT: The only part I want on the	16	of the parties or a relative or employee of such
17	record is the stipulation that Mr. Osborne and I have	17	attorney or counsel;
18	agreed that you are going to do a transcript of the	18	That I am not financially interested in
19	Exhibit 5; we'll mark the transcript Exhibit 6. And	19	the action and have no contract with the parties,
20	you can -- you don't need to take the -- the transcript	20	attorneys or persons with an interest in the
21	needs to be only of the good doctor and his explanation	21	action that affects or has a substantial tendency
22	of it. It's really the training part.	22	to affect my impartiality;
23	MR. OSBORNE: There was another -- there was	23	That the cost of the original has been
24	another gentleman's voice on there, too. Just	24	charged to the party who noticed the deposition,
25	whoever --	25	and that all parties who ordered copies have been
			charged at the same rate for such copies;
			That the witness DID request an opportunity to
			review the transcript.
			WITNESS MY HAND AND SEAL this 2nd day of
			March, 2013.
			
			Jane T. Doby
			Registered Merit Reporter
			Notary Public
			Hennepin County, Minnesota

45 (Pages 174 to 177)

Michael Berkow  
2/25/2013

	178
1 STATE OF MINNESOTA )	
2 : SS CERTIFICATE	
3 COUNTY OF HENNEPIN )	
4 I, MICHAEL BERKOW, certify that I have read	
5 and examined the typewritten transcript of the	
6 deposition, taken of me in the matter of	
7 Larry E. Smith, as trustee for the Heirs and Next of	
8 Kin of David Cornelius Smith vs. TIMOTHY GORMAN, ET	
9 AL., on February 25, 2013, consisting of the preceding	
10 pages, and find the same to be true and correct.	
11 (Except as follows):	
12                      Reason	
13 Page Line Correction              for Change	
14 _____	
15 _____	
16 _____	
17 _____	
18 _____	
19 _____	
20 _____	
21 _____	
22 Dated this _____ day of _____	
23 _____	
24                      MICHAEL BERKOW	
25	
	179
1 EXAMINATION INDEX	
2 By Mr. Bennett: 4-175	
3	
4 OBJECTION INDEX	
5 By Mr. Osborne: 41, 51, 68, 70, 75, 154, 168, 169	
6 By Mr. Bennett: 82 (request to strike)	
7	
8 BERKOW EXHIBIT INDEX	
9 Exhibit 1: Berkow report (12/17/2012)	
10 marked/identified/reviewed              3,4,27,34,40,47,84	
11	
12 Exhibit 2: Attachment A, Rule 26(B) Disclosures	
13 marked/identified/reviewed              34,22	
14 Exhibit 3: Attachment B, educational background,	
15 training, operational experience and	
16 qualifications	
17 marked/identified/reviewed              3,4,5,9	
18	
19 Exhibit 4: Berkow report (3/15/2012)	
20 marked/identified/reviewed              28	
21 Exhibit 5: Compact disk labeled "MPD Prone Restraint	
22 Training Video"	
23 marked/identified/reviewed              175	
24 Exhibit 6: Transcript of "MPD Prone Restraint	
25 Training Video"	
26 marked/identified/reviewed              175	
27 INDEX OF PREVIOUSLY MARKED EXHIBITS	
28	
29 Exhibit 4: Cause of Death Hierarchy Report	
30 reviewed                      78	
31	
32 Exhibit 30:	
33 reviewed                      99,125	
34 Exhibit 37: 9.15.2010 Statement of Officer Callahan	
35 reviewed                      41,47,52	
36	
37	

46 (Pages 178 to 179)